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## VOL. 128.—ILLINOIS REPORTS.

23

9	37a <sup>3</sup> 399	209	139	12 <sup>1</sup> 516	146	491	566
d 161	2619	s 29a <sup>3</sup> 515	166	12480	174	12449	182 <sup>1</sup> 44
176	202	80a <sup>3</sup> 127	172	4577	153 <sup>13</sup> 53	162 <sup>13</sup> 80	60a <sup>1</sup> 617
51a <sup>2</sup> 647	123	152 <sup>1</sup> 390	182	480	165 <sup>19</sup> 395	27a <sup>2</sup> 254	568
52a <sup>2</sup> 92	50a <sup>2</sup> 673	71a <sup>4</sup> 177	79a <sup>4</sup> 469	68a <sup>12</sup> 210	480	s 18a <sup>1</sup> 173	d 160 <sup>2</sup> 172
72a <sup>2</sup> 294	129	132 <sup>4</sup> 336	27a <sup>2</sup> 214	49a <sup>14</sup> 472	s 21a <sup>1</sup> 618	145 <sup>2</sup> 342	155 <sup>2</sup> 348
66a <sup>3</sup> 452	s 27a <sup>2</sup> 214	214	55a <sup>20</sup> 355	502	161 <sup>2</sup> 449		
35a <sup>4</sup> 56	174 <sup>1</sup> 250	176 <sup>3</sup> 78	349	s 25a <sup>1</sup> 591			
83a <sup>4</sup> 166	160 <sup>3</sup> 575	222	175 <sup>4</sup> 569	180 <sup>1</sup> 282	583		
44a <sup>6</sup> 185	136	s 18a <sup>1</sup> 150	363	150 <sup>2</sup> 218	174 <sup>1</sup> 154		
20	146 <sup>2</sup> 296	179 <sup>2</sup> 597	170 <sup>1</sup> 198	510	179 <sup>1</sup> 14		
s 29a <sup>2</sup> 239	37a <sup>4</sup> 101	48a <sup>2</sup> 535	36a <sup>2</sup> 80	163 <sup>5</sup> 109	35a <sup>1</sup> 243		
168 <sup>3</sup> 485	151 <sup>5</sup> 625	148 <sup>3</sup> 263	68a <sup>2</sup> 72	518	68a <sup>2</sup> 500		
55a <sup>3</sup> 510	153 <sup>5</sup> 68	151 <sup>3</sup> 69	370	s 30a <sup>1</sup> 116	585		
23	148	37a <sup>3</sup> 268	s 28a <sup>1</sup> 516	140 <sup>2</sup> 508	167 <sup>1</sup> 456		
s 29a <sup>4</sup> 225	21a <sup>2</sup> 60	153 <sup>4</sup> 640	53a <sup>2</sup> 631	152 <sup>3</sup> 589	183 <sup>2</sup> 147		
180 <sup>1</sup> 540	34a <sup>3</sup> 648	54a <sup>4</sup> 495	378	138 <sup>3</sup> 40	136 <sup>6</sup> 162		
52a <sup>1</sup> 647	76a <sup>3</sup> 519	82a <sup>4</sup> 468	s 22a <sup>1</sup> 580	146 <sup>3</sup> 539	d 146 <sup>2</sup> 281		
76a <sup>1</sup> 384	161 <sup>2</sup> 283	229	s 27a <sup>1</sup> 375	168 <sup>3</sup> 562	595		
152 <sup>2</sup> 645	168 <sup>2</sup> 383	139 <sup>11</sup> 118	s 35a <sup>1</sup> 624	d 147 <sup>2</sup> 232	s 143 U.S. 452		
150 <sup>4</sup> 631	44a <sup>4</sup> 330	148 <sup>7</sup> 426	d 157 <sup>1</sup> *324	178 <sup>5</sup> 570	d 80a <sup>1</sup> 248		
144 <sup>5</sup> 532	44a <sup>4</sup> 382	152 <sup>7</sup> 188	51a <sup>2</sup> 265	142 <sup>5</sup> 480	d 144 <sup>4</sup> 608		
34a <sup>5</sup> 267	62a <sup>4</sup> 583	178 <sup>7</sup> 625	55a <sup>4</sup> 428	162 <sup>5</sup> 438	603		
43a <sup>5</sup> 133	63a <sup>6</sup> 79	237	384	162 <sup>2</sup> *354	138 <sup>1</sup> 593		
d 44a <sup>6</sup> 221	67a <sup>6</sup> 680	164 <sup>2</sup> 194	s 26a <sup>1</sup> 621	521	141 <sup>1</sup> 223		
29	138 <sup>7</sup> 616	248	35a <sup>2</sup> 490	s 30a <sup>1</sup> 166	155 <sup>3</sup> 582		
s 29a <sup>3</sup> 304	173 <sup>7</sup> 516	s 29a <sup>2</sup> 219	397	133 <sup>5</sup> 35	148 <sup>4</sup> 630		
164 <sup>4</sup> 424	46a <sup>7</sup> 574	169 <sup>6</sup> 615	s 30a <sup>3</sup> 38	142 <sup>5</sup> 549	167 <sup>4</sup> 430		
65a <sup>4</sup> 158	163	d 39a <sup>4</sup> 589	54a <sup>2</sup> 297	150 <sup>3</sup> 361	181 <sup>4</sup> 390		
35a <sup>5</sup> 606	s 28a <sup>5</sup> 552	256	67a <sup>4</sup> *579	163 <sup>5</sup> 529	618		
71a <sup>5</sup> 453	151 <sup>12</sup> 86	s 17a <sup>1</sup> 144	404	523	s 27a <sup>5</sup> 518		
76a <sup>6</sup> 644	84a <sup>11</sup> 170	271	39a <sup>100</sup>	s 27a <sup>2</sup> 299	d 54a <sup>12</sup> 85		
37	d 32a <sup>4</sup> 163	s 29a <sup>3</sup> 31	408	138 <sup>1</sup> 270	53a <sup>2</sup> 285		
50a <sup>4</sup> 499	142 <sup>6</sup> 67	152 <sup>1</sup> 133	s 27a <sup>2</sup> 275	64a <sup>1</sup> 83	67a <sup>2</sup> 66		
180 <sup>2</sup> 64	146 <sup>6</sup> 621	144 <sup>2</sup> 326	54a <sup>1</sup> 283	75a <sup>2</sup> 583			
77a <sup>2</sup> 182	174 <sup>6</sup> 27	45a <sup>10</sup> 109	57a <sup>1</sup> 182	137 <sup>4</sup> 656	83a <sup>1</sup> *196		
45	35a <sup>3</sup> 343	77a <sup>2</sup> 516	57a <sup>1</sup> 182	527	619		
s 28a <sup>5</sup> 532	73a <sup>5</sup> 521	37a <sup>2</sup> 516	144 <sup>2</sup> 224	s 28a <sup>1</sup> 136	165 <sup>6</sup> 304		
56	173	d 61a <sup>5</sup> 596	154 <sup>3</sup> 608	131 <sup>1</sup> 121	167 <sup>6</sup> 621		
183 <sup>18</sup> 189	149 <sup>13</sup> 171	279	43a <sup>1</sup> *399	162 <sup>5</sup> 339	137 <sup>7</sup> 323		
57	d 151 <sup>2</sup> 683	s 26a <sup>6</sup> 609	422	s 27a <sup>1</sup> 356	171 <sup>7</sup> 441		
162 <sup>13</sup> 364	178	167 <sup>2</sup> 295	171 <sup>5</sup> 252	s 58a <sup>3</sup> 44	64a <sup>7</sup> 662		
131 <sup>2</sup> 496	164 <sup>16</sup> 464	172 <sup>2</sup> 639	57a <sup>5</sup> 685	545	79a <sup>7</sup> 58		
141 <sup>2</sup> 102	45a <sup>5</sup> 557	180 <sup>2</sup> 398	146 <sup>5</sup> 570	s 30a <sup>200</sup>	627		
166 <sup>7</sup> 168	133 <sup>4</sup> 218	37a <sup>2</sup> 627	430	163 <sup>1</sup> 627	s 138 <sup>208</sup>		
160 <sup>7</sup> 16	163 <sup>5</sup> 565	180 <sup>2</sup> 398	144 <sup>14</sup> 149	d 54a <sup>1</sup> 31	s 28a <sup>3</sup> 371		
66a <sup>7</sup> 387	180 <sup>5</sup> 365	54a <sup>2</sup> 566	145 <sup>5</sup> 641	57a <sup>1</sup> 194	s 38a <sup>5</sup> 556		
72a <sup>7</sup> 595	187	59a <sup>2</sup> 431	145 <sup>5</sup> 641	36a <sup>3</sup> 565	56a <sup>1</sup> 213		
166 <sup>8</sup> 536	60a <sup>2</sup> 247	60a <sup>2</sup> 247	146 <sup>7</sup> 26	173 <sup>2</sup> 178	65a <sup>5</sup> 556		
177 <sup>8</sup> 109	61a <sup>2</sup> 257	131 <sup>8</sup> 159	173 <sup>2</sup> 178	65a <sup>5</sup> 556			
163 <sup>4</sup> 592	f 85a <sup>2</sup> 514	174 <sup>9</sup> 353	35a <sup>2</sup> 22	631			
s 29a <sup>17</sup> 173	44a <sup>3</sup> 443	85a <sup>2</sup> 388	d 71a <sup>2</sup> 169	s 27a <sup>2</sup> 288			
173 <sup>12</sup> 625	142 <sup>5</sup> 606	63a <sup>2</sup> 1217	36a <sup>3</sup> 72	40a <sup>3</sup> 72	645		
d 173 <sup>16</sup> 631	185 <sup>10</sup> 400	178 <sup>5</sup> 541	443	145 <sup>2</sup> 271			
166 <sup>21</sup> 230	181 <sup>12</sup> 518	53a <sup>4</sup> 627	44a <sup>3</sup> 400	s 30a <sup>91</sup>	158 <sup>3</sup> 316		
63a <sup>2</sup> 81	199	45a <sup>2</sup> 598	3228				
66a <sup>21</sup> 253	s 133 <sup>368</sup>	55a <sup>3</sup> 438	163 <sup>2</sup> 214	645	145 <sup>2</sup> 271		
88	s 149 <sup>536</sup>	59a <sup>2</sup> 680	2145	549			
s 28a <sup>571</sup>	s 33a <sup>607</sup>	60a <sup>2</sup> 289	417	158 <sup>3</sup> 316			
95	s 51a <sup>67</sup>	65a <sup>2</sup> 308	484	556			
142 <sup>3</sup> 393	133 <sup>1297</sup>	51a <sup>301</sup>	485	556			
137 <sup>4</sup> 63	135 <sup>1532</sup>	176 <sup>2</sup> 2140	s 25a <sup>600</sup>	s 25a <sup>194</sup>	135 <sup>2</sup> 647		
31a <sup>10</sup> 575	181 <sup>2</sup> 364	167 <sup>3</sup> 72	s 30a <sup>258</sup>	143 <sup>2</sup> 545			
137 <sup>12</sup> 74	183 <sup>2</sup> 142	153 <sup>5</sup> 316	158 <sup>1</sup> 642	35a <sup>2</sup> 644			
110	39a <sup>2</sup> 98	188 <sup>1</sup> 381	50a <sup>1</sup> 549	50a <sup>2</sup> 471			
s 29a <sup>124</sup>	59a <sup>2</sup> 313	81a <sup>4</sup> 481	134 <sup>2</sup> 313	50a <sup>2</sup> 471			
154 <sup>15</sup>	43a <sup>4</sup> 499	81a <sup>5</sup> 181	166 <sup>4</sup> 594	152 <sup>3</sup> 467			
115	53a <sup>4</sup> 548	67a <sup>9</sup> 53	478	152 <sup>3</sup> 467			
s 21a <sup>312</sup>	204	169 <sup>11</sup> 138	33a <sup>4</sup> *437	45a <sup>3</sup> 641			
s 29a <sup>172</sup>	s 28a <sup>547</sup>	142 <sup>5</sup> 53	41a <sup>2</sup> 164	51a <sup>2</sup> 390			
120	1100	173 <sup>11</sup> 380	51a <sup>5</sup> 335	70a <sup>3</sup> 334			
			51a <sup>5</sup> 330	51a <sup>2</sup> 334			



# VOL. 128. ILLINOIS REPORTS.

**Always consult this table before using a case.**

29:89 Wis 65	173:71 Fed 817	248:57 Fed 477	443:94 Wis 298	556:133 US 124
37:6 LRA 205n	8 LRA 124n	9 LRA 669n	23 LRA 403n	33 LED 545
19 LRA 105n	24 LRA 416	21 LRA 712	485:9 LRA 70n	55 Fed 888
		35 LRA 550	38 LRA 649n	78 Fed 202
45:7 LRA 794n	187:7 LRA 520n		39 LRA 154	21 LRA 74n
57:11 LRA 778n	35 LRA 370	271:10 LRA 285n		27 LRA 327
		21 LRA 606n	478:22 LRA 546	568:21 LRA 393
67:18 LRA 133n	91 Wis 120	21 LRA 615	496:10 LRA 288n	585:22 LRA 750
38 LRA 731n	6 LRA 108n	279:20 LRA 586n		
95:7 LRA 693n	22 LRA 38n	287:82 Mich 368	502:63 Fed 377	595:140 US 131
19 LRA 250	22 LRA 57	9 LRA 562	527:8 LRA 749	35 LED 383
	27 LRA 326		533:12 LRA 567n	143 US 449
126:6 LRA 370n	229:26 LRA 645	408:30 LRA 48n	540:10 LRA 127n	36 LED 223
20 LRA 207n	26 LRA 686	430:141 US 819	545:73 Fed 778	143 US 455
21 LRA 54n		35 LED 733	19 LRA 747	36 LED 228
28 LRA 139	237:8 LRA 131n	19 LRA 484		20 LRA 149
	24 LRA 304n	19 LRA 849	549:23 LRA 155n	
168:10 LRA 286n		21 LRA 463	613:6 LRA 242n	
168:14 LRA 267n		23 LRA 642n	619:26 LRA 755n	
26 LRA 131n			655:34 LRA 324n	

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23

# REPORTS

OF

## CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

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NORMAN L. FREEMAN,  
REPORTER.

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VOLUME 128.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN APRIL AND MAY,  
1889, AND SOME CASES IN WHICH APPLICATIONS FOR  
REHEARING WERE DENIED AT THE MARCH  
AND OCTOBER TERMS, 1889.

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## TABLE OF CASES

REPORTED IN THIS VOLUME.

<b>A</b>	<b>PAGE.</b>	<b>PAGE.</b>	
Allen <i>et al. ads.</i> McDonald.....	521	Claypool <i>ads.</i> McFarland.....	397
Ames <i>et al. v.</i> Sankey <i>et al.</i> ....	523	Cockern <i>et al. ads.</i> Long.....	29
Anslow <i>et al. ads.</i> Giles <i>et al.</i> ..	187	Cole <i>et al. ads.</i> People <i>ex rel.</i>	
Auburn, Village of, <i>v.</i> Goodwin		Davidson, Treas.....	158
<i>et al.</i> .....	57	Crane Bros. Manufacturing Co.	
		<i>ads.</i> Kankakee Coal Co.....	627
<b>B</b>		Cravener <i>ads.</i> Hale.....	408
Badger <i>et al. ads.</i> Grant.....	386	Curry <i>ads.</i> Baylies.....	287
Baker <i>ads.</i> Nat. Bank of Illinoi			
<i>s.</i> .....	533		
Baylies <i>v.</i> Curry.....	287	<b>D</b>	
Becker, Admr. <i>ads.</i> Chicago		Dayton <i>v.</i> Drainage Comra.....	271
West Division Ry. Co.....	545	Donnersberger <i>v.</i> Prendergast	
Bozarth <i>et al. v.</i> Largent.....	95	<i>et al.</i> .....	229
Bragg <i>v.</i> Olson <i>et al.</i> .....	540	Drainage Comrs. <i>ads.</i> Dayton..	271
Brooks <i>et al. ads.</i> Woodward		Drake <i>et al. v.</i> Ogden.....	603
<i>et al.</i> .....	222	Dubois <i>ads.</i> Western Union Tel-	
Brownell <i>v.</i> Steere.....	209	egraph Co.....	248
Brown <i>et al. v.</i> Miner, Frost &			
Hubbard.....	148	<b>E</b>	
Burnett <i>ads.</i> Thomas <i>et al.</i> ....	37	Eckhart <i>et al. v.</i> Irons <i>et al.</i> ....	568
Butler & McCracken <i>v.</i> Gain..	23	Elgin, Joliet & Eastern R. R.	
		<i>Co. v.</i> Fletcher <i>et al.</i> .....	619
<b>C</b>			
Catlin, Receiver, <i>ads.</i> Sercomb	556	<b>F</b>	
Chapman <i>et al. ads.</i> People		Fellows <i>et al. ads.</i> Stewart <i>et al.</i>	480
<i>ex rel.</i> Barber, Coll.....	496	Fielden <i>et al. v.</i> People.....	595
Cheltenham Improvement Co.		Fisher <i>et al. v.</i> Jansen.....	549
<i>v.</i> Whitehead.....	279	Fletcher <i>et al. ads.</i> Elgin, Jo-	
Chicago, Milwaukee & St. Paul		liet & Eastern R. R. Co.....	619
Ry. Co. <i>v.</i> Harper.....	384	Fort, Admr. <i>v.</i> Richey, Admx..	502
Chicago & Northwestern Ry.		Fortune <i>et al. ads.</i> Jones.....	518
<i>Co. et al. v.</i> Snyder, Admx..	655		
Chicago, Santa Fe & California		<b>G</b>	
Ry. Co. <i>v.</i> Ward.....	349	Gage <i>v.</i> Goudy.....	566
Chicago West Division Ry. Co.		Gain <i>ads.</i> Butler & McCracken.	23
<i>v.</i> Becker, Admr.....	545	Galbreath <i>ads.</i> Shoot.....	214
Chisholm <i>v.</i> Williams <i>et al.</i> ....	115	Gastka <i>ads.</i> North Chicago City	
		Ry. Co.....	613

PAGE.	PAGE.
Germania Ins. Co. v. Swigert, Auditor..... 237	Largent <i>ads.</i> Bozarth <i>et al.</i> .... 95
Giles <i>et al.</i> v. Anslow <i>et al.</i> .... 187	Latimer <i>ads.</i> Illinois Central, R. R. Co..... 163
Goodwin <i>et al.</i> <i>ads.</i> Village of Auburn..... 57	Leland, Admr. <i>et al.</i> <i>ads.</i> Win- slow..... 304
Goudy <i>ads.</i> Gage..... 566	Littlejohn <i>ads.</i> Prichard..... 123
Gould <i>et al.</i> v. Sternberg..... 510	Lloyd <i>et al.</i> <i>ads.</i> Strean <i>et al.</i> .. 493
Grant v. Badger <i>et al.</i> ..... 386	Long v. Cockern <i>et al.</i> ..... 29
Gruhn v. Richardson <i>et al.</i> .... 178	
<b>H</b>	
Hale v. Cravener..... 408	McDonald v. Allen <i>et al.</i> ..... 521
Hanks v. Rhoads <i>et al.</i> ..... 404	McFarland v. Claypool..... 397
Harper <i>ads.</i> Chicago, Milwau- kee & St. Paul Ry. Co..... 384	Miller <i>et al.</i> v. Kingsbury..... 45
Harris v. People..... 585	Miner, Frost & Hubbard <i>ads.</i> Brown <i>et al.</i> ..... 148
Haward v. Peavey ..... 430	Moore <i>et al.</i> <i>ads.</i> Jordan <i>et al.</i> .. 56
Healy, Clerk <i>ads.</i> People <i>ex rel.</i> Ellis <i>et al.</i> ..... 9	Moore, Admr. v. Sweeney, Admr..... 204
Hoobler <i>et al.</i> v. Hoobler..... 645	Moore v. Shurtleff <i>et al.</i> ..... 370
Huesing v. City of Rock Island <i>et al.</i> ..... 465	Myers v. Union Nat. Bank.... 478
<b>I</b>	
Illinois Central R. R. Co. v. Lat- imer..... 163	Nat. Bank of Illinois v. Baker. 533
Irons <i>et al.</i> <i>ads.</i> Eckhart <i>et al.</i> .... 568	North Chicago City Ry. Co. v. Gastka..... 613
Irwin, Admr. v. Wollpert <i>et al.</i> .... 527	
<b>J</b>	
Jansen <i>ads.</i> Fisher <i>et al.</i> ..... 549	Ogden <i>ads.</i> Drake <i>et al.</i> ..... 603
Jones v. Fortune <i>et al.</i> ..... 518	O'Hair <i>et al.</i> <i>ads.</i> People <i>et al.</i> .. 20
Jordan <i>et al.</i> v. Moore <i>et al.</i> .... 56	Olson <i>et al.</i> <i>ads.</i> Bragg..... 540
<b>K</b>	
Kankakee Coal Co. v. Crane Bros. Manufacturing Co.... 627	P Pearson v. Sanderson..... 88
Kankakee, City of, <i>ads.</i> Kan- kakee Stone and Lime Co.. 173	Peavey <i>ads.</i> Haward <i>et al.</i> .... 430
Kankakee Stone and Lime Co. v. City of Kankakee..... 173	People <i>ex rel.</i> Barber, Coll. v. Chapman <i>et al.</i> ..... 496
Kendig <i>et al.</i> <i>ads.</i> Pratt <i>et al.</i> .. 293	— <i>ex rel.</i> Baker, Coll. <i>ads.</i> St. Louis Bridge Co.. 422
Kimball <i>ads.</i> Smith, Receiver. 583	— <i>ex rel.</i> Davidson, Treas. v. Cole <i>et al.</i> ..... 158
Kingsbury <i>ads.</i> Miller <i>et al.</i> ... 45	— <i>ex rel.</i> Ellis <i>et al.</i> v. Healy, Clerk..... 9
Kirchoff v. Union Mutual Life Ins. Co..... 199	— <i>ads.</i> Fielden <i>et al.</i> ..... 595
Klein <i>et al.</i> <i>ads.</i> Koehler..... 393	— <i>ads.</i> Harris..... 585
Knowles v. Knowles..... 110	— <i>et al.</i> v. O'Hair <i>et al.</i> .... 20
Koehler v. Klein <i>et al.</i> ..... 393	Pratt <i>et al.</i> v. Kendig <i>et al.</i> .... 293

Q	PAGE.	PAGE.		
Quincy Building and Homestead Association <i>ads.</i> Wigget et al.....	67	Sweeney, Admr. <i>ads.</i> Moore, Admr.....	204	
Quincy, City of, <i>ads.</i> Prince..	443	Swigert <i>ads.</i> Germania Ins. Co.	237	
<b>R</b>				
Raymond v. Vaughn.....	256	Thomas et al. v. Burnett.....	37	
Rhoads et al. <i>ads.</i> Hanks.....	404	Thomas et al. <i>ads.</i> Wilkinson et al.....	363	
Richardson et al. <i>ads.</i> Gruhn..	178	Tyler et al. v. Sanborn et al...  <b>U</b>	136	
Richey, Admx. <i>ads.</i> Fort, Admr	502	Umlauf v. Umlauf.....	378	
Rock Island, City of, et al. <i>ads.</i> Huesing.....	465	Union Mut. Life Ins. Co. <i>ads.</i> Kirchoff.....	199	
<b>S</b>				
Sanborn et al. <i>ads.</i> Tyler et al.	136	Union Nat. Bank <i>ads.</i> Myers..	478	
Sanderson <i>ads.</i> Pearson.....	88	<b>V</b>		
Sanders v. Seelye et al.....	631	Vaughn <i>ads.</i> Raymond.....	256	
Sankey et al. <i>ads.</i> Ames et al..	523	<b>W</b>		
Seelye et al. <i>ads.</i> Sanders....	631	Ward <i>ads.</i> Chicago, Santa Fe & California Ry. Co.....	349	
Sercomb v. Catlin, Receiver..	556	Western Union Telegraph Co. v. Dubois.....	248	
Shoot v. Galbreath.....	214	Whitehead <i>ads.</i> Cheltenham Improvement Co.....	279	
Shurtliff et al. <i>ads.</i> Moore...	370	Wilkinson et al. v. Thomas et al	363	
Smith, Receiver, v. Kimball...	583	Williams et al. <i>ads.</i> Chisholm.	115	
Snyder, Admx. <i>ads.</i> Chicago & Northwestern Ry. Co. et al..	655	Williamson et al. v. Stone et al.	129	
Steere <i>ads.</i> Brownell.....	209	Winget et al. v. Quincy Build-		
Sternberg <i>ads.</i> Gould et al....	510	ing and Homestead Ass'n...	67	
Stewart et al. v. Fellows et al..	480	Winslow v. Leland, Admr. et al	304	
St. Louis Bridge Co. v. People ex rel. Baker, Coll.....	422	Wollpert et al. <i>ads.</i> Irwin, Admr	527	
Stone et al. <i>ads.</i> Williamson et al.....	129	Woodward et al. v. Brooks et al.	222	
Stream et al. v. Lloyd et al....	493			



## CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF ILLINOIS.

THE PEOPLE *ex rel.* Almon D. Ellis *et al.*

v.

JOHN J. HEALY, Clerk.

*Filed at Ottawa April 3, 1889.*

1. **FRAUD AND DECEIT**—*in the purchase of goods upon credit.* The representation of a person that he wished to purchase goods on credit can not be said to be false, when he does, in fact, make such a purchase. The representation that he will pay the price at the termination of the credit is simply a promise to pay, and his subsequent inability to discharge his obligation does not render him liable to an action for fraud and deceit.

2. Representations and promises of payment by a purchaser on credit, even if he at the time does not intend to pay, is but an unexecuted intention, which, of itself, does not constitute an actionable fraud. A promise to perform an act, though accompanied with an intention not to perform, is not such a representation as can be made the ground of an action at law, as for fraud. The party should sue upon the promise.

3. It is not enough, to maintain an action by the vendor of goods for fraud and deceit, that the purchaser knew himself at the time to be insolvent, and had no reasonable expectation of paying for the goods. It is, however, true, that the purchase of goods by one who at the time intends never to pay for the same, is such a fraud as will entitle the vendor to rescind the sale and reclaim the property, although there were no fraudulent representations or false pretenses.

128	9
139	336
128	9
35a	56
128	9
44a	185
128	9
161	619
51a	647
52a	92
128	9
66a	452
128	9
72a	294
128	9
176	203
128	9
83a	166
128	9
189	1864
128	9
96a	1160
128	9
105a	488

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Syllabus.

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4. **PLEADING**—*of the declaration—in an action for fraud and deceit.* In an action to recover for fraud and deceit, the plaintiff must allege the facts relied on as constituting the fraud, and when false representations are relied on, it is essential that they relate to some material existing fact or facts, and not to the future intention of the defendant. The ground of liability in such cases rests upon the affirmation of some existing fact, which the party making knows, or has good reason to know, to be false.

5. In this case it was alleged in the declaration, that on, etc., the plaintiffs were possessed of certain goods, of the value of \$1000, and that “the defendant, falsely and fraudulently, and for the purpose of inducing the plaintiffs to part with the possession of said goods, represented to the plaintiffs that he desired to purchase said goods of the plaintiffs on credit, and that he would pay for said goods their reasonable value, and thereupon the plaintiffs, relying upon the said representations and promises of the defendant in that behalf, and believing the same to be true, sold and delivered the said goods to the defendant on credit; and said plaintiffs aver that said promises and representations of defendant were utterly false at the time they were made, and were so known to the defendant, and were made by him with the fraudulent purpose of obtaining possession of said goods without paying for the same, and that at that time defendant was wholly insolvent, and was fully aware of that fact, and knew, when he bought said goods, that he could not pay for the same as he agreed, and that defendant has never paid for said goods, and obtained the same from plaintiffs with the fraudulent purpose of not paying for the same, and of cheating and defrauding the plaintiffs out of said goods.” Held, that the declaration failed to show a cause of action arising out of a tort, so as to justify the issue of a *ca. sa.* against the body of the defendant.

6. **SAME**—*form of action, as determining the nature of the cause of action.* As the form of action adopted will not necessarily determine the nature of the cause of action,—whether it is for a tort or breach of contract,—the allegations of the declaration will be looked to for the purpose of ascertaining whether the acts complained of constitute a tort, within the meaning of the statute allowing the imprisonment of the defendant by the writ of *capias ad satisfaciendum*.

7. **IMPRISONMENT—JUDGMENT DEBTOR**—*of a second imprisonment for same cause.* Where a judgment debtor has been discharged from imprisonment on a *ca. sa.*, in due form, upon the ground that the process was issued in a case not involving a tort, he can not again be imprisoned on an *alias* writ issued in the same cause, and the issue of another writ of *ca. sa.* will not be compelled by *mandamus*, for the reason such a writ would be void if issued.

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Brief for the Petitioners.

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This was a petition for a *mandamus*, filed in this court by the relators, to compel the respondent to issue an *alias ca. sa.* against Elias Levee. The material facts appear in the opinion.

Messrs. FLOWER, REMY & GREGORY, for the petitioners:

The purchase of goods on a credit, with a preconceived design not to pay for them, is an actionable fraud. *Lockwood v. Doane*, 107 Ill. 235; *Dow v. Sanburn*, 3 Allen, 181; *Johnson v. Monell*, 2 Keyes, 655; *Devoe v. Brandt*, 53 N. Y. 462; *Stewart v. Emerson*, 52 N. H. 301; *Starch Factory v. Lindrum*, 57 Iowa, 573.

When the proof shows that a man has bought goods upon a credit, with no reasonable expectation of paying for them, a jury may from it find that a fraudulent intent not to pay existed. *Talcott v. Henderson*, 31 Ohio St. 162; *Davis v. Stewart*, 8 Fed. Rep. 803; *Powell v. Bradlee*, 9 G. & J. 220.

It is thought that an *alias capias ad satisfaciendum* may issue. There seems to be no provision of the statute authorizing an *alias* execution, either against the person or property of a defendant. However, it would appear to be well settled that a plaintiff is entitled to such a writ, or to a *pluries*, against the body or lands or chattels. It is so laid down as to property. *Freeman on Executions*, sec. 48, *et seq.*

This practice is recognized by this court. *Bryan v. Smith*, 2 Scam. 47; *Lampsett v. Whitney*, id. 441; *Scammon v. Swartwout*, 35 Ill. 326.

The same principle applies to executions against the body, or writs of *capias ad satisfaciendum*. 2 Tidd's Pr. 1031; *Freeman on Executions*, sec. 457.

The exemption from a second arrest for the same cause is purely statutory. It was inserted in the English statute to prevent a re-arrest after a person had been discharged upon *habeas corpus*, and with no purpose of accomplishing what is now sought. *Attorney General v. Kwok-a-Ling*, 29 L. T. Rep. (N. S.) 114. See, also, *Hurd on Habeas Corpus*, 563.

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Brief for the Respondent.

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Mr. RUFUS KING, for the respondent:

The action in which the judgment was rendered is not an action for tort, and the judgment is not a judgment for a tort committed by the defendant, within the meaning of section 5, chapter 77, of the Revised Statutes, and section 12, article 2, of the constitution of this State.

The judgment was by default, and it becomes important to examine the declaration, in order to determine whether the action was an action *ex contractu* or *ex delicto*. The proof, of course, could not have been broader than the declaration, and if it does not contain such charges of fraud "as can be made the ground of an action at law," then simply calling the action "trespass on the case," does not make the action one of tort, nor the judgment a judgment for a tort committed by the defendant.

It is not the form of the action, but the grievance charged and proved, that determines the character of the action. It is well settled, that whether an action is or is not for a tort, is determined by the substance,—not the form,—of the declaration, or the name the pleader may choose to apply. 1 Hilliard on Torts, 35; *McDuffie v. Beddoe*, 7 Hill, 578; *Weal v. King*, 12 East, 452; *Heirn v. McCaughan*, 32 Miss. 1; *Railroad Co. v. Hurst*, 36 id. 660.

As distinguished from the false representations of a fact, the false representations as to matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud in law. Kerr on Fraud and Mistake, 88; Bigelow on Estoppel, 481; *Gallagher v. Brunell*, 6 Cow. 346; *Gage v. Lewis*, 68 Ill. 604.

The action being on a statute, and no affidavit as required by the statute, no *ca. sa.* was authorized. *In re Salisbury*, 16 Ill. 350; Rev. Stat. chap. 77, sec. 5.

The judgment debtor having been arrested under a *ca. sa.* issued upon the judgment, and duly discharged, on *habeas corpus*, by the circuit court, he can not be again arrested for

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Opinion of the Court.

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the same cause,—that is, upon the same judgment,—and an *alias capias ad satisfaciendum* can not issue.

No person who has been discharged, by order of the court or judge, on a *habeas corpus*, shall be again imprisoned, restrained or kept in custody for the same cause. Rev. Stat. chap. 65, sec. 26.

To avail of the exception of the statute, the pleader must bring himself within its terms. *Williamson v. Hogan*, 46 Ill. 504; *Railroad Co. v. Lavery*, 71 id. 522; *Hyman v. Bayne*, 83 id. 256; Gould's Pl. chap. 4, sec. 22; 1 Chitty's Pl. 246.

Where, in the order of discharge, there is no reason for the discharge assigned, nor any statement in it that the merits were investigated, it will be presumed that the court did examine the merits of the case. *Walker v. Martin*, 43 Ill. 509.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

A petition was filed in this court by Almon D. Ellis and another, for a *mandamus*, to compel the respondent, John J. Healy, clerk of the Superior Court of Cook county, to issue an *alias capias ad satisfaciendum* against the body of Elias Levee, upon a judgment in that court in favor of petitioners, against said Levee. It is shown that said judgment was recovered March 17, 1884, in an action of trespass on the case, for \$374.70. May 16, 1884, the defendant, Levee, was arrested upon a *ca. sa.* issued on said judgment, and imprisoned until June 6, 1884, when he was discharged on a writ of *habeas corpus*. In August following, petitioners demanded of the clerk of said court that he issue an *alias ca. sa.* against the body of Levee, which he refused to do, and hence this petition.

The statute provides, that "no execution shall issue against the body of the defendant, except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad respondendum*, as provided by law, or he shall

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Opinion of the Court.

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refuse to surrender up his estate for the benefit of his creditors." Rev. Stat. chap. 77. sec. 5.

The respondent answered the petition, and to which a general demurrer was interposed. It will not be necessary here to set out in detail the petition and answer, but we will proceed to determine the case made thereby. The petition proceeds upon the basis that the judgment was recovered for a tort committed by the defendant. The answer, in effect, denies that the cause of action was for a tort, and sets up the discharge of the defendant, on *habeas corpus*, from arrest and imprisonment for the same cause for which the writ is now asked to be issued.

The first question presented is, was the cause of action on which the judgment was obtained, a tort committed by the defendant. It was by default, and we must therefore look to the allegations of the declaration, which is made an exhibit, rather than to the form of action adopted by the pleader, to ascertain the nature of the cause of action. 1 Hilliard on Torts, 35; *McDuffy v. Beddoe*, 7 Hill, 578; *Weal v. King*, 12 East, 452; *Railroad Co. v. Hurst*, 36 Miss. 660.

If one, by means of a false warranty, induces another to purchase, the purchaser may have his remedy upon the contract of warranty, or he may bring suit for the tort. (Cooley on Torts, 90.) So a recovery may be had for money embezzled, in an action *ex contractu*. It is apparent, therefore, that the form of the action will not necessarily determine the nature of the cause of action.

The declaration alleges, that on the first day of September, 1883, plaintiffs were possessed of certain goods, of the value of \$1000, and that "the defendant, falsely and fraudulently, and for the purpose of inducing the plaintiffs to part with the possession of said goods, represented to the plaintiffs that he desired to purchase said goods of the plaintiffs on credit, and that he would pay for said goods their reasonable value, and thereupon the said plaintiffs, relying upon the said represen-

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Opinion of the Court.

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tations and promises of said defendant in that behalf, and believing the same to be true, sold and delivered the said goods and chattels to said defendant on credit; and said plaintiffs aver that said promises and representations of said defendant were utterly false at the time they were made, and were so known to the said defendant, and were made by said defendant with the fraudulent purpose of obtaining possession of said goods without paying for the same, and that at that time said defendant was wholly insolvent, and was fully aware of that fact, and knew, when he bought said goods, that he could not pay for the same as he agreed, and that said defendant has never paid for said goods, and obtained said goods from said plaintiffs with the fraudulent purpose of not paying for the same, and of cheating and defrauding said plaintiffs out of said goods."

In an action to recover for fraud and deceit, the plaintiff must allege the facts relied on as constituting the fraud, and where false representations are relied upon, it is essential that they relate to some material existing fact or facts, and not to the future intention of the defendant, which he may or may not perform. ✓ The only representation of an existing fact here alleged is, that the defendant desired to purchase the goods on credit, and as he did so purchase them, it can not be said that the representation in respect thereof was false. The declaration alleges that plaintiffs sold and delivered the goods to the defendant on credit, but it wholly fails to show that when the suit was brought, the time had expired when payment was to be made therefor. ✓ The representations of a purchaser of goods on credit, that he will pay the value of the articles purchased, is simply a promise to pay. Every purchaser on time, either expressly or impliedly, undertakes and promises to pay at the expiration of the credit, and a subsequent inability to discharge his obligation will not render the purchaser liable to an action for fraud or deceit.

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Opinion of the Court.

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The ground of liability, in this class of cases, that renders the defendant amenable to an action in tort, rests upon the affirmation of some existing fact which the party making it knows, or has good reason to know, to be false. In *Gallagher v. Brunell*, 6 Cow. 350, the court, in commenting on *Paisley v. Freeman*, 3 T. R. 513, say: "In that case the defendant encouraged the plaintiff to sell goods, and fraudulently affirmed that the purchaser was a person safely to be trusted. The *gravamen* was the false affirmation of an existing fact—not a promise to do a future act at the time not intended to be performed, and which, notwithstanding the intent, might or might not be performed." And after quoting BULLER, J., in the *Paisley case*, to the same effect, the court conclude: "It is evident what must be the species of fraud for which the law gives redress—falsehood as to an existing fact." In respect of the allegation of a promise to pay without any intention to perform, it is said in Kerr on Fraud and Mistake, 88: "As distinguished from the false representation of a fact, the false representation as to a matter of intention, though it may have influenced a transaction, is not a fraud in law." In *Gage v. Lewis*, 68 Ill. 604, after quoting the above from Kerr with approval, this court said: "It can not be said that these representations and promises were false when made, for until the proper time arrived, and the plaintiff refused to comply with them, it could not positively be known that they would not be performed. Even if, at the time they were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. If they legally amount to anything, they constitute a contract." And in the same case it is said: "A promise to perform an act, though accompanied at the time with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise."

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Opinion of the Court.

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In Massachusetts, under a statute making the debtor liable to imprisonment if "the debtor contracted the debt with an intention not to pay for the same," it was held that the charge that the debtor, "at the time when the debt was contracted, did not intend to pay the same," and that "he contracted said debt having no intention to pay the same, and having no expectation that it would be paid," was not sufficient, even after verdict. *Chamberlain v. Hoags*, 1 Gray, 172.

The allegation of the declaration is, that the defendant's promises and representations were made by him "with the fraudulent purpose of obtaining possession of said goods without paying for the same." It is not alleged that the defendant never intended to pay for them, and the pleadings and exhibits before us negative such an intention. The sale was in September, and amounted substantially to \$1000, which, at the time of proving plaintiff's claim before the assignee of Levee, and also of the rendition of this judgment, was reduced to less than \$375, and the assignment by Levee, in December following his contracting this indebtedness, showed assets to substantially seventy-five per cent of his entire liabilities. There is no allegation in the declaration that the defendant therein made any representation as to his solvency or financial ability, or that plaintiffs were not fully acquainted with the same. It is not enough, to maintain the action, that the defendant knew himself to be insolvent, and had no reasonable expectation of paying for the goods purchased.

In *Blow v. Gage*, 44 Ill. 208, the debtors made an assignment of their property for the benefit of creditors shortly before the arrival of the goods purchased, and the assignee took them when they arrived. In a suit to avoid the sale, this court said: "It has never been considered fraudulent for business houses to purchase on credit simply for the reason that they knew that they were unable at the time to pay their debts." See, to the same effect, *Biggs v. Barry*, 2 Curtis, 259; *Hodgeden v. Hubbard*, 18 Vt. 504; *Lloyd v. Brewster*, 4 Paige, 537; *Henneguin*

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Opinion of the Court.

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v. *Nailor*, 24 N. Y. 139; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Merrill v. Blackmer*, 42 Conn. 324; *Talcott v. Henderson*, 31 Ohio St. 162; *Shipman v. Seymour*, 40 Mich. 274; *Kline v. Rector*, 57 Miss. 538; *Merrill v. Corbin*, 13 Bradw. 81; *Rowley v. Bigelow*, 12 Pick. 307.

It is true that the purchase of goods by one who at the time never intends to pay for them, is such a fraud as will entitle the vendor to rescind the sale, although there were no fraudulent representations or false pretenses. (Benjamin on Sales, sec. 439; *Farwell v. Hanchett*, 120 Ill. 573; *Ryan v. Brant*, 42 id. 78; *Bowen v. Schuler*, 41 id. 193.) But the petitioners did not seek to avoid the sale and recover back the possession of the goods sold, as in the cases last cited; and in order to hold a purchaser of goods liable, in an action on the case, for fraud and deceit, he must have been guilty of making false representations or practicing some artifice or deception; and where the alleged false representations are made the basis of the action, they must, as we have seen, relate to some past or existing fact.

We are of opinion that the allegations of the declaration were insufficient to enable plaintiffs therein to maintain an action for a tort. Their action should have been in assumpsit, for the price and value of the goods. It appears, therefore, that the plaintiffs' judgment is not for a tort committed by the defendant, within the meaning of the statute, and it follows that the petitioners have not now, and never had, upon that judgment, a right to an execution against the body of the defendant therein.

It appears from the answer of the respondent, which is admitted to be true by the demurrer, that a writ of *ca. sa.* was issued on said judgment May 16, 1884, in due form of law, upon which Levee was arrested and committed to the common jail of Cook county. Afterwards, and on June 6, 1884, he was discharged upon *habeas corpus*, by the Hon. JOHN G. ROGERS, then one of the judges of the circuit court of said county. The

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Opinion of the Court.

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answer to the petition in this case attaches the petition and order in such *habeas corpus* proceeding thereto, and makes it a part of the answer, and avers the truthfulness of the matters therein alleged and set forth.

Section 26, chapter 65, of the Revised Statutes, provides, that "no person who has been discharged, by order of the court or judge, on a *habeas corpus*, shall be again imprisoned, restrained or kept in custody for the same cause." This section also provides, that the following, among others, shall not be deemed to be the same cause: "(2) If, in any civil suit, the party has been discharged for any illegality in the judgment or process, and is afterwards imprisoned by legal process for the same offense;" and (3) "generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party may be a second time imprisoned, if the cause be legal, and the forms required by law observed." The answer expressly alleges that "the cause upon or for which the said petitioner has applied to this respondent, and requested him to issue an *alias capias ad satisfaciendum*, as alleged in their petition, is the same cause" upon which the said Levee was imprisoned, and from which he was discharged upon *habeas corpus*, as before mentioned. The only ground stated in the petition for *habeas corpus*, made an exhibit to and part of the answer of respondent herein, for the discharge of Levee, was, that the *capias* "issued in a case and under circumstances where the law does not allow process for imprisonment to issue; that he is imprisoned for the non-payment of a debt owing by him to Ellis & Putnam for merchandise purchased by him of them, and being for a balance on account of \$374.70." It therefore affirmatively appears that the relators are seeking by this proceeding to obtain an *alias ca. sa.* to again imprison said Levee for "the same cause" as that on which he was before imprisoned, and from which he was discharged. It is not shown or pretended that the discharge was on account of any defect or illegality in the

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Syllabus.

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judgment or process, or "on account of the non-observance of any of the forms required by law." If the discharge had been procured for any such reason, it was incumbent upon the petitioner to make the same appear. It follows, therefore, that the writ should be denied upon the ground, also, that said Levee can not be imprisoned a second time upon said judgment, and that the issue of the writ authorizing the same would be illegal, and, if issued, void.

The prayer of the petitioners will be denied.

*Writ denied.*

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128	20
55a	510
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168	485
128	20
192	*879
97a	*109
128	20
196	*267

THE PEOPLE OF THE STATE OF ILLINOIS *et al.*

v.

M. E. O'HAIR *et al.*

*Filed at Springfield April 5, 1889.*

1. FRANCHISE—*what constitutes.* The privilege or right to be a corporation is a franchise.

2. SAME—*quo warranto to question right—against whom.* Where the assumed right or franchise is denied, and is sought to be questioned by an information in the nature of a *quo warranto*, the writ is properly issued against those who are attempting to exercise the right or franchise.

3. APPEAL—*whether a franchise is involved.* On an information in the nature of a *quo warranto*, against commissioners of highways assuming to act as drainage commissioners of a certain drainage district, on the ground that such district has not been legally organized, a franchise is involved, and an appeal from the judgment of the trial court lies directly to this court, and not to the Appellate Court.

4. COSTS—*on appeal—where there is no jurisdiction.* Where an appeal is taken to the Appellate Court in a case involving a franchise, and is there entertained, and an appeal is taken from that court to this court by the same party, the judgment of the Appellate Court will be reversed and the cause remanded, with direction to dismiss the appeal, and no costs will be taxed in either court against the appellee.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Coles county; the Hon. C. B. SMITH, Judge, presiding.

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Opinion of the Court.

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Mr. S. M. LEITCH, State's Attorney, Messrs. WILEY & NEAL, Mr. CHARLES G. ECKHART, and Mr. J. A. CONNOLLY, for the appellants.

Messrs. CRAIG & CRAIG, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a proceeding by information in the nature of a *quo warranto*, in the circuit court of Coles county, to determine the existence of a certain claimed drainage district as a corporation. The precise question presented is shown by the following quotation from the information:

"And said State's attorney therefore gives the court to understand and be informed, that said pretended drainage district, called Union District No. 2, was attempted to be formed when and while said paper in writing, purporting to be a petition, did not contain the signatures of a majority of the adult persons owning lands in said district, who were the owners of more than one-third of the land situate in said proposed district, and did not contain the signatures of the owners of the major part of the land, who constitute one-third or more of the owners of the land, as is required by the statute, and that said pretended Union District No. 2 was not legally organized and formed, and was and is not a drainage district, under and in accordance with the statute; and therefore said State's attorney says, that Michael E. O'Hair, Joseph McNeil and Louis Grooms, since the 4th day of June, 1886, have held and executed, and now hold and execute, without any warrant or right, the office of drainage commissioners of said pretended Union Drainage District No. 2, of the towns of Seven Hickory and Humboldt, which said office they, and each of them, during all the time aforesaid, have usurped, and still do usurp, to the damage of the said People," etc.

The law under which the organization of the drainage district was attempted, makes the commissioners of highways in

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Opinion of the Court.

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each town in the several counties adopting township organization, drainage commissioners in and for all drainage districts in their respective towns. (1 Starr & Curtis, p. 942, sec. 99.) The respondents are conceded to be commissioners of highways of the town, and the only question is, whether they, being such, are also a body politic and corporate, styled "drainage commissioners,"—and this turns solely upon whether the drainage district is lawfully organized.

The privilege or right to be a corporation is a franchise. *Fietsam v. Hay et al.* 122 Ill. 293; *Coal and Mining Co. v. Edwards et al.* 103 id. 472; 2 Blackstone's Com. p. 37; Angell & Ames on Corp. sec. 4. The franchise is here denied, and the writ is properly issued to those who assume to exercise it. *Cheshire et al. v. The People ex rel.* 116 Ill. 493; *The People v. Board of Education*, 101 id. 308.

The judgment must determine whether the franchise exists, for the litigation has no other aim, and so, necessarily, the franchise is involved in the litigation.

*The People ex rel. v. Holtz et al.* 92 Ill. 426, is authority only for the position that the mere right to hold an office is not a franchise. But, as has been shown, the question here is not the right to hold an office, but, being highway commissioners, the right to be a corporate body as "drainage commissioners," which, beyond all question, is a franchise.

Under section 88 of the amended Practice act, (2 Starr & Curtis, p. 1842,) the appeal should have been brought direct to this court, because a franchise is involved. The Appellate Court had no jurisdiction. The judgment of the Appellate Court is therefore reversed, and the cause remanded to that court, with direction to dismiss the appeal. No costs will be taxed in either court against appellees.

*Appeal dismissed.*

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Syllabus.

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## BUTLER &amp; McCACKEN

*v.*

## ELLA GAIN.

*Filed at Mt. Vernon April 5, 1889.*

1. **MECHANIC'S LIEN—*strict construction*.** The statute giving a mechanic, material-man or sub-contractor a lien on the premises of the owner of a building erected or repaired, is in derogation of the common law, and is to be strictly construed. Therefore, a party seeking a lien under its provisions must show a clear compliance with all the requirements of the statute.

2. **SAME—*rights of sub-contractor, material-man, etc.—notice to the owner.*** The statute does not give to a sub-contractor, mechanic, or person furnishing material to the original contractor, a lien absolutely, without notice to the owner of the rights of such sub-contractor, mechanic or material-man. The statute requires such persons claiming a lien, to give the owner notice thereof, when he has not received the same from the contractor.

3. This notice is required to be served on the owner within forty days from the completion of the sub-contract, or within the same period after payment should have been made to the sub-contractor, etc.

4. If the contractor furnishes the owner with a sworn statement, setting forth the names of all persons entitled to be protected, with the sums due or to become due them, then all the purpose intended by the notice in section 30 is accomplished, and the sub-contractor or material-man will not be required to serve the notice provided for in the latter section.

5. If the owner of a building has notice of the rights and interests of sub-contractors and material-men, either under section 30 or 31, or from the sworn statement of the original contractor, and pays the original contractor, without retaining a sum sufficient to satisfy the claims of the sub-contractors, etc., such payment will be in violation of the rights of sub-contractors, etc. If the owner is not so served within forty days, he may lawfully pay off his contractor without liability to any other lienholder.

**APPEAL** from the Appellate Court for the Fourth District;—heard in that court on appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding.

198	23
144	532
128	23
150	631
152	645
44a	621
128	23
52a	647
128	23
76a	384
198	23
189	510
128	23
87a	271

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Statement of the case.

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This was a petition by Butler & McCracken, lumber merchants, against appellee, Gain, and one Wiegriffe, defendants, to enforce a mechanic's lien as sub-contractors. The petition shows that one Benjamin Summers, a contractor, on August 27, 1887, contracted to build a house for Ella Gain, appellee, for the sum of \$685, the same to be completed in forty-five days from that date; that the last payment was due on the completion of the work; that the house was finished and accepted by Ella Gain on October 11, 1887; that appellee paid to Summers \$500 on the contract, without demanding, in writing, or receiving of said contractor, a statement, under oath, of the number and name of every sub-contractor, mechanic and workman in his employ, or of persons furnishing material, giving their names and the rate of wages, or the terms of contract, and how much, if anything, was due or to become due for work done and materials furnished, and without retaining out of the money due said Summers on account of said contract, an amount sufficient to pay the demands of petitioner and other sub-contractors, workmen and mechanics furnishing material and labor under said contract; that on the 11th of October, 1887, and now, there is due from said Gain to said Summers \$185 on the contract; that after said Summers made such contract with said Gain, he contracted with petitioners for lumber for said house, and, accordingly, lumber and materials to the amount of \$286.42 were furnished by petitioners, which were put in said house; that said material was to be paid for by Summers at the time mentioned in the original contract between Gain and Summers; that Summers has paid \$85, and there remains due to petitioners \$201.42; that on November 2, 1887, within four months after the last payment became due, they filed in the office of the circuit clerk of St. Clair county their lien against said house, etc., a copy of which is annexed as an exhibit; and that on December 20, 1887, they caused to be served on said Gain a copy of the notice required by statute, notifying her that

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Opinion of the Court.

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petitioners had been employed by said Summers to furnish materials, and had furnished the same, for the erection of her house. The petition makes Ella Gain, Benjamin Summers and Theodore Wiegriffe defendants. The court below overruled a demurrer to this petition, and decreed that complainants have a mechanic's lien on the premises for \$201.42, and that Gain and Summers pay the same within thirty days, and that in default thereof the premises be sold, etc. Ella Gain took the case, by appeal, to the Appellate Court for the Fourth District, where the decree of the city court of East St. Louis was reversed, and the cause remanded, with directions to dismiss the bill for want of equity. From this judgment the petitioners prosecute this appeal.

Mr. JAMES J. RAFTER, for the appellants.

Mr. L. H. HITE, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This is a proceeding by sub-contractors to establish and enforce a mechanic's lien. The sections of the statute relating to the matter under consideration, are sections 29, 30, 31 and 35 of the statute relating to liens, as amended in 1887. These sections, relating to the same subject, must necessarily be construed together.

A lien is given by section 29, to sub-contractors, or other persons who shall perform labor or furnish material for the original contractor, but provides that the aggregate of all liens allowed shall not exceed the price stipulated in the original contract between the contractor and the owner, "unless payment be made to the original contractor, or to his order, in violation of the rights of the persons intended to be benefited by section 35" of the same act. The 30th section requires the person performing such labor or furnishing material, to serve a written notice upon the owner, stating that he has been

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Opinion of the Court.

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employed by the contractor to perform work or furnish material for the owner's building, and that he intends to assert a lien against the property ; "Provided, such notice shall not be necessary when the sworn statement of the contractor, provided for in section 35" of the act, "shall serve to give the owner true notice of the amount due, and to whom due." Section 31 of the act provides, that "if there is a contract in writing between the original contractor and the subsequent contractor, a copy of such sub-contract, if the same can be obtained, shall be served with such notice and attached thereto, which notice shall be served within forty days from the completion of such sub-contract, or within forty days after payment should have been made to the person performing such labor or furnishing such materials."

It is provided by section 35, that "the original contractor shall, whenever any payment of money shall become due from the owner, or whenever he desires to draw any money from the owner, lessee or his agent, on such contract, make out and give to the owner, lessee or his agent, a statement, under oath, of the number and name of every sub-contractor, mechanic or workman in his employ, or person furnishing materials, giving their names and the rate of wages, or the terms of contract, and how much, if anything, is due or to become due to them, or any of them, for work done or materials furnished ; and the owner, lessee or his agent shall retain out of any money then due to the contractor, an amount sufficient to pay all demands that are due or to become due said sub-contractors, mechanics and workmen, or person furnishing material, as shown by the contractor's statement, and pay the same to them according to their respective rights ; and all payments so made shall, as between such owner and contractor, be considered the same as if paid by such original contractor. Until the statement provided for in this section is made in manner and form as herein provided, the contractor shall have no right of action or lien against the owner on account of such contract,

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Opinion of the Court.

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and any payment made by the owner before such statement is made, or without retaining sufficient money, if that amount is due or is to become due, to pay the sub-contractors, mechanics, workmen, or person furnishing materials, as shown by the statement, shall be considered illegal, and made in violation of the rights of the persons intended to be benefited by this act, and the rights of such sub-contractors, mechanics, workmen, or persons furnishing material, to a lien, shall not be affected thereby." The remainder of this section gives the owner a right to demand such statement at any time during the progress of the work, and imposes a penalty on the contractor for a failure to furnish the same.

The statute giving a mechanic, a material-man or sub-contractor a lien on the premises of the owner of a building erected or repaired, is in derogation of the common law, and is to be strictly construed; therefore, a party seeking a lien under its provisions, must show a clear compliance with all the requirements of the statute. *Belanger et al. v. Hersey et al.* 90 Ill. 70; *Canisius et al. v. Merrill et al.* 65 id. 67; *Stephens v. Holmes*, 64 id. 336; *Cook et al. v. Heald et al.* 21 id. 429; *Huntington v. Barton*, 64 id. 504; *Brady v. Anderson et al.* 24 id. 110. The statute does not give to a sub-contractor, mechanic, or person furnishing material to the original contractor, a lien absolutely, without notice to the owner of the rights of such sub-contractor, mechanic or material-man. It would be difficult, if not impracticable, for the owner of the building being erected to ascertain the names of all persons who might furnish the contractor with material to be used in such building, or who might perform labor thereon, and the statute has wisely required such persons claiming a lien to give him notice thereof when he has not received the same from the contractor. As has been seen, section 31 requires the notice required by the preceding section to be served on the owner within forty days from the completion of the sub-contract, or within the same period after payment should have been made to such

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Opinion of the Court.

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person. If the contractor furnishes the owner with a sworn statement, setting forth the names of all persons entitled to be protected, with the sums due them, then all the purpose intended by the notice in section 30 is accomplished, and the sub-contractor or material-man will not be required to serve the notice provided for in the latter section.

It is to be observed (section 29) that the owner shall not, except in case of fraud, be compelled to pay a greater sum on account of his house than the original contract price, "unless payments be made to the original contractor, or his order, in violation of the rights and interests of the persons intended to be benefited by section 35" of the act. When is a payment to the original contractor in violation of the rights and interests of the sub-contractor or person furnishing material? It is undoubtedly when the owner has had notice of such persons' rights, either under section 30 or 31, or from the sworn statement of the original contractor. The notice under sections 30 and 31, to be available, must be served within forty days, as we have seen. This notice was not served on appellee within the time required, and consequently her payment to the contractor was not illegal as to the appellants, or in violation of their rights or interests, unless she had notice of their claim by the sworn statement of the original contractor. This is not shown. The petition fails to show that the conditions of the proviso to section 30 arose to exempt appellants from giving notice, but, on the contrary, that appellee did not receive or require from the contractor the statement provided in section 35, and, consequently, the statement not being given, could not "serve to give her due notice" of the claim of appellants, or of the amount due them.

Appellee undoubtedly had the right to refuse payment to the contractor until he furnished her a sworn statement, as provided by the statute; but without notice that there were sub-contractors or other persons entitled to a lien on her property, she was not bound to demand such statement as a con-

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Syllabus.

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dition precedent to payment of the amount due the contractor. It is only the persons to whom a lien is given that section 35 is intended to protect. Their right to a lien does not depend upon the omission of the owner to do or perform any act, but does depend upon something they must themselves do, unless the necessity for their action is avoided by the act of the original contractor in furnishing the sworn statement. If the contractor fails to give the owner notice of the sub-contractors' or material-men's lien, they must give the notice, in order to protect their rights under the statute.

Appellants not having taken the proper steps to perfect their lien, by giving notice of their claim within forty days, as provided in section 31 of the act, can not complain of appellee that she did not demand a sworn statement of the contractor. She owed them no duty until notified of their rights in some of the modes prescribed by the law. This leads to an affirmation of the judgment of the Appellate Court, and it is accordingly affirmed.

*Judgment affirmed.*

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JAMES F. LONG

v.

LOTHAIRE B. COCKERN *et al.*

*Filed at Springfield April 5, 1889.*

1. CHANCERY—*admission in answer, whether evidence against a co-defendant.* In a contest between the mortgagee of chattel property and a purchaser from the mortgagor, in which the mortgagee claims the property as a fixture to real estate mortgaged to him, the answer of the mortgagor and his wife, admitting that the chattels were fixtures to the realty, is not evidence against the purchaser of the property from the mortgagor.

2. FIXTURE—*portable engine and saw-mill.* The owner of a portable engine and saw-mill sold the same to a party, who moved the machinery, and set it up on his wife's land, and the purchaser and his wife gave

128	29
35a	606
128	29
164	424
65a	158
128	29
71a	453
128	29
76a	644
128	29
92a	5301
128	29
100a	5642

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Brief for the Appellant.

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their mortgage on the land for the price of the engine, mill, etc. The mill was placed upon sills, and attached to stakes driven into the ground, so as to render it stationary while being operated. The engine was sunk into the ground and a shed built over it: *Held*, that the property did not acquire the character of fixtures, so as to become a part of the realty, and pass to the mortgagee.

4. The vendor of a portable engine and saw-mill, after the purchaser had set up the same on his wife's land for use, which was mortgaged for the price, brought replevin for the engine and mill as personal property, which was afterward dismissed, and after a return of the property, the purchaser sold the same, in good faith, to a creditor: *Held*, that the institution of the replevin suit by the vendor, if it did not estop him to claim the property as part of the realty, afforded very strong evidence against him that the property was not real estate.

5. CHATTEL MORTGAGE—*not properly acknowledged*. A chattel mortgage not acknowledged as required by the statute, is void as to creditors and purchasers, notwithstanding actual notice.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Brown county; the Hon. JOHN C. BAGBY, Judge, presiding.

Messrs. BERRY & EPLER, for the appellant:

Such articles as portable mills, engines and boilers, more or less firmly affixed to the realty, will, in the absence of circumstances showing a contrary intention, be presumed to have been attached as permanent accessions to the soil. The tests are: First, actual annexation to the realty; second, application to use in connection with the realty; and third, the intention of the parties making the annexation, to make a permanent accession to the freehold. *Sword v. Low*, 122 Ill. 487.

Fixtures designed for permanent use, and of benefit to the land, are presumed to be real estate, and pass under the mortgage afterward made, as, platform scales let into the ground of a farm. *Arnold v. Crowder*, 81 Ill. 56.

Fixtures put on by the mortgagor after execution of the mortgage, become part of the realty, and subject to the mortgage. (*Wood v. Whelen*, 93 Ill. 153; *Wright v. Gray*, 73 Me.

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Brief for the Appellant.

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297; Ewell on Fixtures, 275-279, and notes, 281, and notes.) For it is presumed the mortgagor intended to improve his own. Ewell on Fixtures, 282.

So of a frame office, adjacent to a mill, resting on wooden blocks on the surface of the ground, put there after mortgage on the mill, is held realty. (*Savings Bank v. Kercheval*, 65 Mo. 682.) So of a Noyes Portable Grist-mill fastened to the floor of a building, for use there. *Potter v. Cromwell* 40 N. Y. 287.

A saw-mill attached to floor timbers, passes under a prior mortgage. *Davenport v. Shants*, 43 Vt. 546.

A saw-mill erected on government land under pre-emption right, afterward lost, becomes a part of the realty, and the occupant has no right to remove the same. Ewell on Fixtures, 57, note 4; *Treadway v. Sharon*, 7 Nev. 37.

Buildings and mills put by a mortgagor on mortgaged land are held by the mortgagee till the mortgage debt is paid. (*Matzon v. Griffin*, 78 Ill. 477; *Burnside v. Twitchell*, 48 N. H. 390.) And if the fixtures be removed from the land mortgaged, equity will follow, and subject the same to the mortgage lien, (*Kimball v. Darling*, 32 Wis. 675,) as, where a grist and saw-mill are severed and levied on by other creditors. *Witmer's Appeal*, 45 Pa. St. 455.

The insertion of the portable mill, etc., into the mortgage of the land, was immaterial, as it became realty by being placed on the land. *Vogle v. Ripper*, 34 Ill. 100.

A severance by the owner, or by the tortious act of a stranger, or by the act of God, will not constitute the thing severed realty. *Rogers v. Gillinger*, 30 Pa. St. 1885; *Gray v. Holdship*, 17 S. & R. 413.

Neither the owner of land, his assignee, nor a stranger, can divest the lien without the consent of the party entitled to the benefit thereof, (Ewell on Fixtures, 47,) as, where the debtor detaches fixtures from the land after levy of execution thereon, (*Latham v. Blakely*, 70 N. C. 368,) or where severance is made by a third party. *Gray v. Holdship*, 17 S. & R. 413.

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Brief for the Appellee.

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Nor, in case of a mortgage, could severance divest the lien without the consent of the mortgagee. *Witmer's Appeal*, 45 Pa. St. 455; *Hoskin v. Woodward*, id. 42; *Kimball v. Darling*, 32 Wis. 687; *Hutchins v. King*, 1 Wall. 53.

Generally speaking, the mortgagee has the same rights as the owner of the fee, and may enjoin the removal of fixtures, (1 High on Injunctions, sec. 478; Ewell on Fixtures, 408,) and follow the same, if severed. *Matzon v. Griffin*, 78 Ill. 477.

The mortgagee may enjoin cutting timber. *Nelson v. Pinegar*, 30 Ill. 473.

After the mortgagee had taken possession, it was immaterial whether the mortgage was acknowledged as a chattel mortgage, or whether it was acknowledged at all or not. His possession was notice of his rights. *Gaar, Scott & Co. v. Hurd*, 92 Ill. 326; *Chipron v. Feikert*, 68 id. 284; *Frank v. Miner*, 50 id. 444.

**Mr. JOHN J. TEEFEY, for the appellee J. W. Metcalf:**

The alteration of the mortgage by Cockern in the absence of his wife made the mortgage void as to her. *White v. Jones*, 38 Ill. 159; *Montag v. Linn*, 23 id. 551.

A fixture is something substantially and permanently attached to the soil, though in its nature removable. 1 Washburn on Real Prop. 20.

Machines which may be used in any other building as well as that in which they are placed, are ordinarily deemed personal chattels, though fastened securely to the freehold, if the same can be removed without material injury to the freehold. 1 Washburn on Real Prop. 25; *Kelly v. Austin*, 46 Ill. 156; *Goff v. O'Conner*, 16 id. 421; *Cook v. Whiting*, id. 480.

Unless Metcalf was guilty of fraud, he will be protected in his purchase. Bishop on Contracts, sec. 1210; *Miller v. Kirby*, 74 Ill. 242; *Hatch v. Jordon*, id. 414; *Gridley v. Bingham*, 51 id. 153; *Ewing v. Runkle*, 20 id. 448.

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Opinion of the Court.

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A creditor purchasing in payment of his debt is protected. *Butters v. Haughwout*, 42 Ill. 18; *Gray v. St. John*, 35 id. 232; *Manning v. McClure*, 36 id. 490; *Waggoner v. Cooley*, 17 id. 245.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a bill in chancery, brought by James F. Long against Lothaire B. Cockern, Emily S. Cockern his wife, and John W. Metcalf, to foreclose a mortgage on certain lands, and to restrain the defendants from removing a certain saw-mill, steam-engine and other personal property appurtenant thereto, out of the jurisdiction of the court. The facts are these: On the 21st day of October, 1885, Long, who then was and for several years had been the owner of a portable steam-engine and saw-mill, boiler-wagon and log-wagon, sold them to Lothaire B. Cockern for \$1200, Cockern agreeing to give Long his note for that amount, and to secure its payment by a mortgage to be executed by himself and wife on certain lands owned by his wife upon which said saw-mill was to be set up and operated, the mortgage to cover also the engine, mill, etc. In pursuance of this agreement Cockern executed his note to Long for \$1200, and he and his wife executed and acknowledged a mortgage on said lands securing said note. When Cockern brought the note and mortgage to Long and offered to deliver them to him, Long objected that no mention was made in the mortgage of the engine, saw-mill, etc., and Cockern thereupon, in his wife's absence, inserted in the mortgage immediately after the description of the land as follows: "Together with one portable steam-engine and saw-mill, boiler-wagon and log-wagon." The note and mortgage were then delivered, and Cockern shortly afterward took possession of the boiler, saw-mill, etc., and set them up on the mortgaged land.

The mill was set on sills, and was fastened to stakes driven into the ground to keep the track from slipping. The boiler was sunk into the ground to about the level of the top, and a

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Opinion of the Court.

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shed was built over them. Cockern, shortly after buying the mill told Long that he had placed it on said premises for permanent use, and that the shed was put there to stay. The oath to the defendants' answers was waived by the bill so that the answers only serve the purpose of pleadings, but both Mr. and Mrs. Cockern admit and allege in their answers that the engine and mill were placed upon said land with the intention that they should become a part of the realty.

Said note became due in April, 1886, and no part of it having been paid, Long, on the 17th day of June, 1886, brought his replevin suit against Cockern for the recovery of said engine, saw-mill, etc., and by virtue of the writ in that suit said property was detached and taken from said premises and delivered into the possession of Long. Subsequently Long dismissed his replevin suit, and judgment was thereupon entered against him therein for costs and for a return of the property replevied, and upon a writ of *retorno habendo* said property was taken by the sheriff from Long and returned to Cockern. On the day the property was returned it was levied upon by virtue of an execution issued upon a judgment by confession for \$1267.50 and costs, in favor of one Edward R. Metcalf and against Cockern. The property was advertised for sale under the execution, and Edward R. Metcalf having in the meantime assigned the judgment to defendant John W. Metcalf, a settlement was made between John W. Metcalf and Cockern by which it was agreed that the levy should be vacated, and that Metcalf should take said property at \$500 and credit that amount on the judgment, Cockern at the same time agreeing to remove the property to Fort Madison, Iowa, and there set it up and operate it as lessee of Metcalf, paying him rent therefor at the rate of \$60 per month.

The evidence tends to show that at the time of said settlement Metcalf had notice of Long's claim to said property by virtue of his mortgage. As Cockern was about to remove said property to Iowa in pursuance of his arrangement with Met-

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Opinion of the Court.

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calf, the present suit was commenced and such removal restrained by injunction. Pending the litigation said property was placed in the custody of a receiver.

The cause was heard on pleadings and proofs, and a decree rendered assessing the amount due to Long on said mortgage and ordering a foreclosure of the mortgage and a sale of the mortgaged premises for the payment of the amount due and costs, but finding that said steam-engine, saw-mill, boiler-wagon and log-wagon were personal property and not within the lien of the mortgage, and directing the receiver to return the same to defendant Metcalf, and ordering that the injunction be dissolved. From this decree Long appealed to the Appellate Court where said decree was affirmed, and by a further appeal said Long has brought the record to this court.

The only question presented by the appeal is, whether the steam-engine, saw-mill, boiler-wagon and log-wagon are subject to the lien of the complainant's mortgage. It is insisted, first, that said property had become attached to the soil so as to become a permanent addition thereto and therefore a part of the realty, and secondly, that if it is to be treated as personal property, the mortgage should, as to it, be held to be a valid chattel mortgage.

It should be observed that the real controversy is between the complainant and defendant Metcalf, and therefore that the admissions or averments of Cockern and wife in their answers can have no force as against Metcalf. Leaving those admissions out of the question, we are of the opinion that, even without reference to the replevin suit, the fair inference to be drawn from the evidence is, that said property did not acquire the character of fixtures so as to become a part of the realty. The engine and saw-mill were of a class of property commonly known as "portable," and they had been owned and used by Long as portable property for five years, and during that time had been moved about and set up and operated by him in several different places. In the mortgage they are described

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Opinion of the Court.

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as a "portable steam-engine and saw-mill," etc. Nor does the evidence show anything in relation to their mode of attachment to the soil after their purchase by Cockern which necessitates the conclusion that it was his intention to make of them a permanent addition to the land. The mill, it is true, was placed on sills and attached to stakes driven into the ground, so as to render it stationary while being operated, but all this, it may be presumed, was necessary to its successful operation wholly irrespective of the permanency of the attachment. The building of a shed doubtless shows that it was the intention of Cockern to operate the mill at the place where he had set it for a considerable time, but it by no means argues that he did not intend to remove it after the timber in that locality should be exhausted.

But the institution by Long of his replevin suit to recover possession of this property as personal property, if not an estoppel upon him, constitutes at least an admission on his part to which very great force must be given, that said property had not become a part of the realty, but still retained its character as goods and chattels. By resorting to replevin he asserted that they were personal property, and in his affidavit in replevin he swore that such was their character. We are of the opinion that the Circuit Court was fully justified, under all the evidence, in holding that said property was not a part of the realty.

It being personal property, can the complainant hold it under his mortgage as a chattel mortgage? There is no pretense that the mortgage was acknowledged as required by the statute in relation to chattel mortgages. Cockern and wife, at the time of its execution, were residents of Hancock county, and the acknowledgment was taken before a notary public of that county, and in the form appropriate to conveyances of real property. The rule is well settled that a chattel mortgage not acknowledged as required by the statute, is void as to creditors and purchasers, notwithstanding actual notice. *Forest*

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Syllabus.

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- v. *Tinkham*, 29 Ill. 141; *Porter v. Dement*, 35 id. 478; *Frank v. Miner*, 50 id. 444; *Sage v. Browning*, 51 id. 217.

Metcalf was a creditor, and so far as appears, took the property from Cockern *bona fide* in part satisfaction of his debt. This he had a legal right to do. The mortgage was void as to him, and it was therefore immaterial whether he had notice of its existence or not.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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128	37
50a	499
128	37
77a	183
128	37
180	64

CHARLES W. THOMAS *et al.*

v.

MARTHA J. BURNETT.

128	37
107a	417

*Filed at Mt. Vernon April 5, 1889.*

1. UNRECORDED DEED—*attaching creditor, without notice.* An attaching creditor who levies his attachment without notice of a prior unrecorded deed of his debtor, either actual or constructive, acquires a lien, which, if perfected by judgment, execution, sale and deed, will hold the legal estate, as against the grantee in the prior unrecorded deed. Having acquired a lien as creditor without notice, he will have a right to enforce the same, notwithstanding he may have, subsequently to the levy of his attachment, received notice of the deed.

2. POSSESSION—*as notice of occupant's rights.* Actual possession of land by a party under an unrecorded deed, is constructive notice of the legal and equitable right of the party in possession. Possession by a tenant is the same, in all respects, as if by the party himself.

3. Actual residence by the owner or claimant of land is not essential to a continuous possession. If the party is in actual possession, and there are continuous acts of ownership, it is sufficient. The fact that a short time may elapse between the actual occupancy by one tenant before another tenant takes possession, will not lose the possession to the owner.

4. B bought a tract of land in 1882, but failed to record her deed until October 22, 1884. After the purchase, B retained C, the prior agent of her grantor, as her agent, who, in August, 1882, rented the premises to J. for one year. The tenant raised a crop thereon, and occupied the

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Brief for the Plaintiffs in Error.

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land till in August, 1884, when he surrendered his possession to C. The premises were again rented in March, 1884. On October 10, 1883, the property was attached as that of B's grantor: *Held*, that the possession of B was sufficient notice of her unrecorded deed, to the attaching creditor.

WRIT OF ERROR to the Circuit Court of Randolph county; the Hon. GEORGE W. WALL, Judge, presiding.

Mr. CHARLES W. THOMAS, *pro se*:

Section 31 of the Conveyance act is as follows: "All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record."

It is hardly necessary to cite authorities to the effect that an attaching creditor is protected by this statute. *Martin v. Dryden*, 1 Gilm. 187; *Stribling v. Ross*, 16 id. 122; *Jones v. Jones*, id. 117. As, also, are purchasers at judicial sales. *McNitt v. Turner*, 16 Wall. 352.

A purchaser at an attachment sale acquires the title as it was at the time the attachment was levied, and not as it was at the time of the sale; and notice to him of an unrecorded deed, given after the levy, and before the sale, will not affect his title under the attachment sale. *Henderson v. Downing*, 24 Miss. 106; *Martin v. Dryden*, 1 Gilm. 187.

The recording of her deed by defendant in error, on the day of the sale under the special execution, was therefore wholly unavailing.

The possession of land, to effect notice of an unrecorded deed, must be such as to indicate an open and visible change in its condition. *McConnel v. Reed*, 4 Scam. 117; *Cabeen v. Breckenridge*, 48 Ill. 91; *Small v. Stagg*, 95 id. 39; *Jefferson v. Jefferson*, 96 id. 551.

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Brief for the Defendant in Error.

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Whenever it is sought to establish notice inferentially, the facts proved ought to be emphatic and distinct. Hence, the observation of the court in *Norcross v. Ridley*, 2 Mass. 605: "Where a prior conveyance is attempted to be supported by fraud in the second purchaser, the fraud must be clearly proved." *Meechen v. Griffing*, 3 Pick. 154; *Jackson v. Sharp*, 9 Johns. 190; *Day v. Dunham*, 2 Johns. Ch. 190; *Jones v. Lygins*, 37 Miss. 546.

"There was no change in the occupancy of the land. At the time of the sale, Chears was in possession by his tenants. After the sale, the same tenants continued to hold, on an agreement to pay rents to Loughbridge & Bogan. Nothing more occurred than a technical attornment of the tenants to them. There was a transfer of the title, but no change of possession that a stranger could observe. The actual occupancy in March and April after the sale, was just as it had been the prior months of the year. In all this there was nothing to arrest notice or to put a creditor or purchaser on inquiry." *Loughbridge v. Bowland*, 52 Miss. 546.

Mr. JAMES A. WATTS, for the defendant in error:

Where a purchaser has sufficient information to lead him to the knowledge of the fact, he is deemed, in law, cognizant of the fact. The decisions are uniform, that possession of land is notice to all of possessor's title. *McConnel v. Reed*, 4 Scam. 117.

Actual residence, either by the party claiming or by tenant, is not indispensable to continuous possession or occupancy. If there are continuous acts of ownership it is sufficient. *Coleman v. Billings*, 89 Ill. 183; *Ford v. Marcall*, 107 id. 136, and authorities cited.

Anything which apprises a purchaser of land or an incumbrancer that a particular person claims the property, or an interest in it, makes it the duty of the former to pursue that notice to its source, and make inquiry of the person claiming such ownership, and failing to do so, he will be chargeable

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Opinion of the Court.

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with all he could have learned had he pursued and investigated the matter to the full extent to which it led. It is not required that he must have full, complete and accurate information of the nature, extent, and all the particulars. *Crawford v. Railroad Co.* 112 Ill. 314.

Possession of land may be held in different modes,—by inclosure, by cultivation, by erecting buildings, by piling logs and lumber thereon, or by any use that indicates an appropriation to the use of the person claiming to hold the property. *Truesdale v. Ford*, 37 Ill. 210.

Possession may be by claim of exclusive right, by digging and removing sand and gravel from a vacant and uninclosed lot by a grantee of the land, by giving the privilege to some and refusing it to others, and at different times making leases to various persons. *Ewing v. Burnett*, 11 Pet. 50,—referred to in *Truesdale v. Ford*, 37 Ill. 210.

The plowing of land is sufficient possession to give notice to subsequent purchasers and incumbrancers, of the title of the person claiming the same under unrecorded deed. *Lyman v. Russell*, 45 Ill. 281.

The actual possession of land by a party, through his tenant, is constructive notice of his rights in the same. *Franz v. Orton*, 75 Ill. 100.

A tax receipt may be explained, and parol proof admitted to show for or by whom the taxes were in fact paid. *Elston v. Kennicott*, 46 Ill. 187.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was a bill filed by Martha J. Burnett, against Charles W. Thomas and the sheriff of Randolph county, to set aside a certificate of purchase held by Thomas upon a forty-acre tract of land owned by the complainant, as a cloud on her title, and to enjoin the sheriff from making a deed under such certificate.

Both parties claim title under James Burnett, a son of the complainant. It is conceded that on the 29th day of March,

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Opinion of the Court.

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1882, James Burnett was the owner of the tract of land in controversy, which was enclosed and in cultivation, but upon which there was no house. On that day the complainant, as it is shown, bought the land in good faith from her son, for the sum of \$1600. No deed was made until in the month of April following, when James Burnett conveyed the land to complainant. No question arises in respect to the payment of the purchase money at the date of the purchase. The land had been under fence and cultivation for over twenty years. David C. Thompson had for some years acted as the agent of James Burnett while he was owner, and had rented the land from year to year. The deed to complainant was not recorded until October 22, 1884, and the land stood on the assessment books in the name of James Burnett until 1885. The complainant, after her purchase, retained Thompson as her agent in respect of this land, and who, in August, 1882, rented the land, as the complainant's, to one Jordan for one year, who raised a crop thereon, and retained possession of the same until in August, 1883, when he surrendered possession to Thompson. In March, 1884, the agent rented the lands to Yagle. At each renting the agent informed the tenants that complainant was the owner of the premises, and that he was renting it for her. A crop was raised on the land each year after 1882 by the tenants of complainant, and the fences were kept in repair by her agent, who collected the rent and paid the same to her. On the 10th day of October, 1883, Margaret Gilfillen sued out an attachment against James Burnett, in the Randolph circuit court, returnable to the March term thereof then following, and this land was levied upon on that day as the property of James Burnett, and a certificate of levy duly filed. At the September term, 1884, of said court, said plaintiff in attachment recovered judgment for \$2500 against said Burnett. Special execution was issued thereon, under which, on October 22, 1884, the tract in controversy was sold to defendant Thomas, attorney of the plaintiff in

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Opinion of the Court.

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question, for \$1900, and the sheriff delivered to Thomas a certificate of purchase, which is the certificate now sought to be set aside.

Section 31 of the Conveyance act declares, that all deeds, etc., authorized by law to be recorded, "shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record."

An attaching creditor who levies his attachment without notice of a prior unrecorded deed of his debtor, either actual or constructive, acquires a lien, which, if perfected by judgment, execution, sale and deed, will hold the legal estate as against the grantee in a prior unrecorded deed. Having acquired a lien as an innocent creditor without notice, he will have a right to enforce the same, notwithstanding he may have, subsequently to the levying of his attachment, received notice of the deed. (*Martin v. Dryden*, 1 Gilm. 187; *Stribling v. Ross*, 16 Ill. 122; *Jones et al. v. Jones*, id. 117; *Henderson v. Downing*, 24 Miss. 106.) Unless, therefore, the plaintiff in attachment had notice, either actual or constructive, of the unrecorded deed from James Burnett to Mrs. Burnett, the lien thereby acquired must prevail over the rights of the complainant under that deed. The statute makes her deed void, as against the attaching creditor, if a lien on the property was thereby secured in good faith, and without notice of her rights.

Complainant's right to the relief sought depends, therefore, upon the fact, whether the plaintiff in attachment, at the time of the levy of the writ, had notice of her rights. There is no pretense that she had actual notice of the unrecorded deed, but it is claimed that she had constructive notice, arising from the possession of the land by complainant. Complainant took possession, after her purchase, by her agent and tenants, as we have seen, long prior to the levy of the attachment, and

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Opinion of the Court.

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which possession she has ever since retained. It is well settled that actual possession of land by a party under an unrecorded deed, is constructive notice of the legal and equitable right of the party in possession. The possession by a tenant is the same, in all respects, as if by the party himself. *Franz v. Orton*, 75 Ill. 100; *Whittaker v. Miller et al.* 83 id. 381; *Coari v. Olsen*, 91 id. 273.

It is claimed by plaintiff in error, that possession, to have the effect of notice, must be of that character which will arrest attention, and the case of *Loughbridge v. Bowland*, 52 Miss. 546, is referred to as sustaining that position. In that case, the grantor of the land, at the time of the conveyance, was in possession of the same by his tenant. After the sale, the same tenant continued to hold possession under an agreement to pay rent to the grantees. There was there nothing more than a technical attornment by the tenant to the purchaser; and the court held, that the mere attornment of the tenant, without any visible change in the character of the holding, was not sufficient to put a creditor or subsequent purchaser on inquiry. It is not necessary to the decision of this case to express any opinion in respect of the doctrine there announced, for the reason that after the complainant's purchase, she, through her agent, made a lease of the property to Jordan. This was in August, 1882, and for one year, and under it a crop was raised. The tenant was informed that his landlord was Mrs. Burnett, the complainant. The agent, as before stated, kept the place in repair as her agent, collected the rents and paid them to her. Here were open, notorious acts of ownership, asserted in an unequivocal manner by the complainant. Thompson, the agent, was not himself in possession of the property, but the tenants of complainant were, and it was their possession which constituted notice.

It is, however, said that there was no tenant in actual possession at the time of the levy of the attachment, and therefore the plaintiff in error was not chargeable with notice of the un-

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Opinion of the Court.

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recorded deed. The tenant's possession of land is that of his landlord. The Jordans occupied the land up to August, 1883, and this was notice to the world of Mrs. Burnett's title, to all intents, as if she had occupied it. Actual residence is not essential to continuous possession. If the party is in actual possession of the land, and there are continuous acts of ownership, it is sufficient. *Coleman v. Billings et al.* 89 Ill. 182; *Ford v. Marcall*, 107 id. 136.

The land here in controversy was improved and under fence. In such case, the owner will not lose his possession by failing to be continuously in the actual occupancy or use of the land, by himself or tenant. The fact that a short time may have elapsed between the actual occupancy by one tenant before another tenant takes possession, will not be a loss of possession by the owner. The improvements, the fact that a crop had been raised the previous season, will clearly indicate the possession, and will be sufficient to put others dealing with the property upon inquiry. The attachment here was levied October 10, 1883, a short time after the tenants had surrendered possession to Thompson, complainant's agent, who still continued to act as such agent in taking care of the property, and the plaintiff should have made inquiry before levying her writ of attachment. It is apparent this could have been done, either of the outgoing tenants or of the agent. Any reasonable, prudent man, contemplating a purchase of the property, would have made such inquiry; and it is clear that an inquiry of the Jordans, or of Thompson, would have led to notice of the claim of complainant, and of the existence of the unrecorded deed.

We think the circumstances are such as to charge the attaching creditor with notice of the deed from James Burnett to the complainant. This being so, the circuit court committed no error in granting the relief prayed, and its decree will be affirmed.

*Decree affirmed.*

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Syllabus.

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ALEXANDER T. MILLER *et al.*

v.

SARAH A. KINGSBURY.

*Filed at Springfield April 5, 1889.*

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97a	601
128	45
198	218

1. CONTRACTS—construction—enforcing the provisions of a contract, severally—of a bond given by a surviving partner to estate of a deceased partner. In construing a bond given by a surviving partner to the personal representative of his deceased partner, all its provisions should be considered and carried into effect, and, when it is possible, the intention of the parties, as declared in each provision of the contract, should be enforced.

2. So where a surviving partner, under the order of the circuit court, executes to the personal representative of the deceased partner a bond conditioned for the faithful discharge of his duties as such surviving partner, and also for the payment to the obligee of whatever might be found due the latter, after paying the partnership debts and costs of settlement, at such time as the circuit court should order and direct, the obligee may maintain an action on the first named condition, on its breach, without any order of the circuit court directing the payment of money to her. An action will lie in favor of the obligee for the neglect of the obligor to apply partnership funds in his hands, to the payment of the partnership debts.

3. SAME—whether individual or representative—and herein, in what capacity to sue. A surviving partner gave his bond, with sureties, to A B, administratrix of the estate of C D, the deceased partner, or to her successor or successors, conditioned for the faithful discharge of his duties as such surviving partner, etc.: Held, that the words following the name of the obligee were merely *descriptio persona*, and might be treated as surplusage, and that she might maintain an action for a breach of the conditions of the bond in her individual name.

4. An executor or administrator may sue as such, as well as in his own name, upon a contract made with him in his representative capacity. In either case, the sum recovered will be held to be for the benefit of the estate.

5. SURVIVING PARTNER—of his duty. It is the duty of a surviving partner to proceed without delay to convert the assets into money, and pay off the partnership debts.

6. MEASURE OF DAMAGES—in action on bond of surviving partner to estate of deceased partner. In an action upon the bond of a surviving partner, given to the administratrix of his deceased partner, for a neg-

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Statement of the case.

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lect to apply the moneys realized from the firm assets to the discharge of the firm debts, the damages are not merely nominal, but a recovery may be had for the value of the performance of the undertaking. The measure will be the sum the estate of the deceased partner would have been released of by performance by the surviving partner.

7. Where the contract is more than for indemnity against damages, or when a party stipulates against the doing of certain acts or the existence of certain conditions, or for performance of any kind, then the value of the performance of the contract will measure the damages recoverable for the breach.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. WILLIAM MARSH, Judge, presiding.

This was an action of debt, brought by Sarah A. Kingsbury, against Alexander T. Miller, George A. Miller and Joseph Simons, on a penal bond executed on the 24th day of June, 1886. It appears from the averments of the declaration, that Alexander T. Miller and Albert B. Kingsbury were partners in business, under the firm name of Miller & Kingsbury; that Kingsbury died intestate on the 16th day of May, 1886, and Sarah A. Kingsbury was appointed administratrix of his estate by the county court of Adams county, on May 25, 1886. It also appears that Sarah A. Kingsbury, administratrix of the estate of said Albert B. Kingsbury, deceased, on, to-wit, the 11th day of June, A. D. 1886, filed her bill in chancery in the circuit court of Adams county, on the chancery side thereof, against Alexander T. Miller, praying, in effect, for an adjustment and settlement of the affairs of said co-partnership of Miller & Kingsbury, and for the appointment of a receiver of the property of said co-partnership. It is also averred, that under and by virtue of an order of the circuit court, a bond was filed in said cause, executed by Alexander T. Miller, George A. Miller and Joseph Simons, in which they acknowledged themselves held and firmly bound unto Sarah A. Kingsbury, administratrix of the estate of Albert B. Kingsbury, deceased, or to her

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Statement of the case.

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successor or successors, in the penal sum of \$5000, conditioned as follows:

"Now, therefore, if the said Alexander T. Miller shall faithfully discharge his duties as the surviving partner of the late firm of Miller & Kingsbury, composed of the following members, to-wit, said Albert B. Kingsbury, deceased, and said Alexander T. Miller, (the said Alexander T. Miller being now the surviving partner of said Albert B. Kingsbury,) and shall make a faithful settlement of the affairs of the said co-partnership, and shall account for and pay over to the said Sarah A. Kingsbury, administratrix of the estate of Albert B. Kingsbury, deceased, or her successor or successors, whatever shall be found to be due her as such administratrix, after paying partnership debts and costs of settlement, at such time when the circuit court of Adams county, in the State of Illinois, shall order such payment to be made by the said Miller, then the above obligation to be void, otherwise to remain in full force and virtue."

It is also averred, that the bond was approved by the circuit court of Adams county, and filed in said cause in chancery. It is then averred in the declaration, that Alexander T. Miller did not faithfully discharge his duties as the surviving partner of the late firm of Miller & Kingsbury, composed as aforesaid; that on the 20th day of November, A. D. 1886, the said Alexander T. Miller, as said surviving partner, presented and filed in said Adams county court, his report of his acts and doings as said surviving partner of the firm of Miller & Kingsbury, from June 9, 1886, to November, 1886; that said Alexander T. Miller, in and by said report, showed a balance of moneys of the said firm in his hands, over and above his outlays, of \$3772.59; that afterwards, and on December 7, 1886, the question of the disposition of said balance came on before said county court for a hearing thereon; that upon such hearing thereof, and on the date last named, the said county court ordered, adjudged and decreed that said Alexander T. Miller,

## Statement of the case.

as said surviving partner, pay to the creditors of the firm of Miller & Kingsbury, outside of and other than said Alexander T. Miller himself, and said Sarah A. Kingsbury, administratrix as aforesaid, the sum of \$3772.59, that being the balance in his hands as shown by said report, and that said Alexander T. Miller pay each of said firm creditors, exclusive of himself and said Sarah A. Kingsbury, administratrix as aforesaid, forty per cent of the principal sum of their claims, as mentioned by said Miller in his inventory of property and schedule of liabilities herein filed on June 9, 1886, within one day from the date of entry of this decree, and that he pay the residue of said sum of \$3772.59 ratably and *pro rata* upon the principal sum of the claims last named, within ten days from the date of the entry of this decree,—from which last named order and decree of said county court no appeal was ever taken, and the same remains in full force and effect; and the plaintiff avers that the following was the schedule of liabilities last named, to-wit:

To First National Bank of Quincy, on note for \$2500, dated March 24, 1886, and payable ninety days from date, with interest at eight per cent - - -	\$2500.00
To First National Bank of Quincy, on note for \$1000, dated March 24, 1886, and payable ninety days from date, with interest at eight per cent from maturity - - - - -	1000.00
To said Albert B. Kingsbury, for money advanced to said firm, balance due November 16, 1885 - -	1788.99
To Quincy Lumber Co., on note for \$261, dated December 29, 1885, and payable ninety days from date, with interest at eight per cent - - - - -	270.28
To Joseph Simons, on note for \$80, dated March 31, 1886, and payable thirty days from date, with in- terest at eight per cent - - - - -	81.20
To James M. Bishop, to balance due on insurance -	270.00
To Frederick M. Whipple, for lumber furnished said firm - - - - -	20.00

And the said plaintiff avers, that though the said Alexander T. Miller did comply with the said order of said county court,

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Brief for the Appellants.

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to the extent of paying forty per cent of the principal sum of the claims in said order and decree of said county court mentioned as those on which he should pay forty per cent on the principal sum, yet the said Miller did not, within ten days from the date of entry of said order, or at any other time, pay to the First National Bank of Quincy, Illinois, upon the \$2500 note in said schedule of liabilities mentioned, or upon the \$1000 note in said last named schedule mentioned, or either of them.

To the declaration the defendants interposed a demurrer, which the court overruled, and defendants electing to abide by the demurrer, plaintiff's damages were assessed at \$1818.47, upon which a judgment was rendered. The judgment, on appeal, was affirmed in the Appellate Court, and to reverse the latter judgment, this appeal is prosecuted by the defendant, Alexander T. Miller.

Mr. J. F. CARROTT, and Mr. J. H. WILLIAMS, for the appellants:

The liability of a surety can not be extended by implication or construction. His liability is *strictissimi juris*, and can not be extended beyond the reasonably necessary import of the language of his bond. *Miller v. Stuart*, 9 Wheat. 703; *United States v. Boyd*, 15 Pet. 207; *Leggett v. Humphreys*, 21 How. 76; *Smith v. United States*, 2 Wall. 235; *People v. Tompkins*, 85 Ill. 417; *Mix v. Singleton*, 86 id. 194; *Phillips v. Manufacturing Co.* 88 id. 305; *Insurance Co. v. Johnson*, 120 id. 622.

The bond, and the order of the circuit court of Adams county in pursuance of which it was given, must be construed together to arrive at the intention of the court and of the parties. *Elmendorf v. Lansing*, 5 Cow. 468.

The recitals in such bonds undertaking to express the precise intent of the parties, controls the condition or obligation which follows, and does not allow it any operation more extensive than the recital which is its key,—and so it has been

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Brief for the Appellee.

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held in many cases. *London Assurance Corporation v. Bold*, 6 Ad. & El. (N. S.) 514.

If the obligation expressed in the bond is larger than the recital, it will be restrained by it, on the principle that the condition is to be confined to the subject matter. Metcalf on Contracts, 280; *Arlington v. Merricks*, 3 Saund. 403, note 5; *Weston v. Mason*, 3 Burr. 1725; *United States v. Cheeseman*, 3 Sawyer, 424; *Commonwealth v. Toms*, 45 Pa. 408; *Smith v. United States*, 2 Wall. 219; *Liverpool Waterworks v. Atkinson*, 6 East. 507; *Banking Association v. Conklin*, 90 N. Y. 116; Brandt on Sureties, secs. 78-80, 138, 142, 143; *Sanger v. Baumberger*, 51 Wis. 592; *Sewing Machine Co. v. Mullins*, 41 Mich. 339.

In the case of an agreement to do or refrain from doing any particular act, secured by a penalty, the amount of the penalty is in no sense the measure of compensation, and the plaintiff must show the particular injury of which he complains, and have his damages assessed accordingly. It may, therefore, be laid down as a settled rule, that no other sum can be recovered under a penalty than that which shall compensate the plaintiff for his actual loss. Sedgwick on Damages, (6th ed.) 487.

The remedy given by statute to compel a surviving partner to account, in the county court, with the administrator of the deceased partner, is to be governed by the same equitable rules and principles as a proceeding in equity, and such surviving partner, on such settlement, may be allowed, as a set-off, his just share of any demands held by him against the deceased partner, without first having procured their allowance. *Mack v. Woodruff*, 87 Ill. 570.

Mr. WILLIAM McFADON, for the appellee:

The question in this case is not as to the person to whom the money sued for upon the bond in controversy shall be paid when collected. *Chadsey v. Lewis*, 1 Gilm. 153; *Manlove v. McHatton*, 4 Scam. 95.

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Brief for the Appellee.

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The simple question is, has the suit been brought by the party in whom the legal interest is vested. *Lovejoy v. Steele*, 18 Bradw. 281; 1 Chitty's Pl. 2; *Newhall v. Turney*, 14 Ill. 339; *Larned v. Carpenter*, 65 id. 544.

The instrument being a bond under seal, the obligee is the proper party to sue upon it. 1 Chitty's Pl. 3, 4; *Saunders v. Filley*, 12 Pick. 554; *Johnson v. Foster*, 12 Metc. 167; *Mellan v. Baldwin*, 3 Gray, 486.

In the case of the bond in suit, the legal interest is clearly in Sarah A. Kingsbury. 1 Chitty's Pl. 2, 3, 4, and cases cited.

This is true, though the promise is to Sarah A. Kingsbury, administratrix, and her successor or successors in office, the test of the truth of this proposition being, that in the event of her death, not her successor in office, but her executor or administrator, would have to bring suit for a breach of the condition. *Stevens v. Hay*, 6 Cush. 230; *Lovejoy v. Steele*, 18 Bradw. 283.

The promise is to A B, administratrix,—not as administratrix; and the words "administratrix," etc., are *descriptio personæ*, and may be rejected as surplusage. *Newhall v. Tunny*, 14 Ill. 338; *Jeffries v. McLean*, 12 Mo. 540; *Bradley v. Graves*, 46 Ala. 277.

The bond was made after the death of A. B. Kingsbury, and the rule is very clear, that upon a promise to one who is his administrator, the suit must be brought by the promisee in his individual capacity. 2 Williams on Executors, (6th Am. ed.) 878; *Austin v. Munso*, 47 N. Y. 366.

But in the case of a bond to the executor or administrator, taken after such death, it must be sued on individually, and not in the representative capacity. 2 Williams on Executors, (6th Am. ed.) p. 882; *Partridge v. Court*, 5 Price, 419; *Hosier v. Arundel*, 3 Bos. & Pul. 7; *Newhall v. Turney*, 14 Ill. 338; *Jeffries v. McLean*, 12 Mo. 540.

Properly construed, the condition of the bond relating to the faithful discharge by Miller of his duty as surviving part-

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Opinion of the Court.

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ner, includes within itself a promise to pay partnership moneys in his hands upon partnership debts, and to the persons holding the same. *Lewis v. Crockett*, 3 Bibb, 197; *Robertson v. Morgan*, 3 B. Mon. 307; *Wilson v. Stillwell*, 9 Ohio St. 468; *Cannon v. Cooper*, 39 Miss. 384; 2 Sutherland on Damages, 39; Rev. Stat. 1874, chap. 3, secs. 85-89.

The breach of the condition of the bond in suit relied on, is a failure to faithfully discharge his duties as the surviving partner of the late firm of Miller & Kingsbury, and not of those conditions of the bonds to which the argument of appellant is mainly devoted.

The duty of a surviving partner to settle the co-partnership business and pay off the firm debts, exists independently of any action of a court, but the county court has full power to enforce the duty. *Miller v. Jonas*, 39 Ill. 60; *McKean v. Vick*, 108 id. 385; *Nelson v. Hayner*, 66 id. 492; Rev. Stat. 1874, chap. 3, sec. 89.

The bond in this case being for performance of a certain thing, viz., the faithful discharge of the duties of a surviving partner, the measure of damages in the case is the value of the performance. 2 Sutherland on Damages, 611; *Lewis v. Crockett*, 3 Bibb, 197; *Robertson v. Morgan*, 3 B. Mon. 307; *Cannon v. Cooper*, 39 Miss. 384; Rev. Stat. 1874, chap. 3, secs. 85, 89.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

The bond upon which the action was brought was filed under an order of the circuit court of Adams county, in a certain cause in chancery pending in the court, wherein Sarah A. Kingsbury, administratrix of the estate of Albert B. Kingsbury, deceased, was complainant, and Alexander T. Miller was defendant, and it is insisted that the principal and his sureties are not liable to an action on the bond until he has failed to obey some order or decree of the circuit court of Adams county, in

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Opinion of the Court.

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relation to the partnership matters concerning which the bond was executed. It is true that the bond provides that "Miller shall make a faithful settlement of the affairs of the said co-partnership, and shall account for and pay over to the said Sarah A. Kingsbury, administratrix of the estate of Albert B. Kingsbury, deceased, or her successor or successors, whatever shall be found to be due her as such administratrix, after paying partnership debts and costs of settlement, at such time when the circuit court of Adams county \* \* \* shall order such payment to be made by the said Miller," and if this was the only provision of the bond, the position of the defendant might be regarded as well founded; but such is not the case. The bond contains a provision, (and that is the one upon which the action is based,) that Alexander T. Miller shall faithfully discharge his duties as the surviving partner of the late firm of Miller & Kingsbury. In placing a construction on the bond, all of its provisions are to be considered and carried into effect, and where it is possible, the intention of the parties, as declared in each provision of the instrument, should be enforced. This provision that Miller shall faithfully discharge his duties as surviving partner, is not dependent upon that clause of the bond relating to an order of the circuit court of Adams county. It is an independent provision that the parties saw proper to incorporate into their contract, and by the execution of the bond, as the parties became bound by it, no reason occurs to us why it may not be enforced.

It is also insisted, that an action can not be maintained on the bond in the name of Sarah A. Kingsbury, in her individual capacity,—that she could only sue as administratrix. It is true that the bond, as executed, provides that the obligors are "held and firmly bound unto Sarah A. Kingsbury, administratrix of the estate of Albert B. Kingsbury, deceased, or to her successor or successors;" but notwithstanding this provision, we are of opinion that the action was properly brought,—that the words following the name of Sarah A. Kingsbury may be

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Opinion of the Court.

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regarded as *descriptio personæ*, and may be rejected as surplusage. In 2 Williams on Executors, (6th Am. ed.) bottom page 878, the author states the rule thus: "So with respect to matters of contract, it has been decided in a variety of modern cases, that an executor or administrator may sue as such, as well as in his own name, upon a contract made with him in his representative capacity." See also note k, on same page. Also, *Parker v. Wilson*, 4 Hill, 57; *Austin v. Monroe*, 47 N. Y. 366; *Wolf v. Beaird*, 123 Ill. 593.

In *Newhall v. Turney*, 14 Ill. 338, this court held that a note given to A, administrator of the estate of C, may be sued upon by A in his own name, without describing himself as administrator. Here, as the contract or bond was made to the plaintiff after the death of her intestate, although she was described as administratrix, we think she had the right to bring the action in her individual name. Again, it was a matter of no moment, so far as the defendants are concerned, whether the action was brought in the individual or representative capacity of the plaintiff. In either event, whatever amount is recovered will be held for the benefit of the estate of Albert B. Kingsbury, deceased, and whatever defense the defendants would be entitled to interpose if the action had been brought in the name of plaintiff as administratrix, may be set up to the present action.

The next question relates to the measure of damages. As has been seen, the condition of the bond was, that Alexander T. Miller shall faithfully discharge his duty as surviving partner. The duty of a surviving party is so well settled that there is no room for controversy over the question. He was required to proceed without delay, and convert the assets into money, and when this was done, his duty required him to proceed at once to pay off the partnership debts. Now, as a breach, it is alleged in the declaration that Miller did not faithfully discharge his duties as the surviving partner; that on the 20th day of November, 1886, he presented and filed in the

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Opinion of the Court.

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county court of Adams county a report of his doings ; that by said report he showed a balance of firm moneys in his hands, over and above outlays, amounting to the sum of \$3772.59 ; that on the 7th day of December, 1886, the question of the disposition of the balance arose in the county court, and the court ordered and decreed that Miller should pay said sum to certain creditors of the firm ; that no appeal was taken from the order, but it remains in full force ; that Miller failed to comply with the order, etc. Under these facts, as they are admitted by the demurrer, was the plaintiff confined to a recovery of nominal damages merely ? We think not. The bond was not given as an indemnity or as security, but, on the other hand, the bond required the performance of certain affirmative acts, and if these were not performed, then the plaintiff ought to recover such damages as she has sustained by the failure to perform those acts. The failure of the surviving partner to pay the firm debts named in the order, left the estate of Kingsbury liable for the same. The rule that should apply in a case of this character is well stated in 2 Sutherland on Damages, 611, as follows : "Where the contract is more than for indemnity against damages, where a party stipulates against the doing of certain acts or the existence of certain conditions, or for \* \* \* performance of any kind, \* \* \* then the value of performance of the contract will measure the damages recoverable for the breach."

A question has been raised as to the sufficiency of the evidence upon which the judgment was rendered. There was evidence tending to prove the amount recovered, and under our statute, the judgment of the Appellate Court, affirming the judgment of the circuit court, is conclusive.

Perceiving no error, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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Syllabus. Opinion of the Court.

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H. C. JORDAN *et al.*

v.

CALVIN MOORE *et al.*

*Filed at Springfield April 5, 1889.*

**APPEAL**—amount involved less than \$1000—absence of certificate of importance. Where the amount involved, on a bill and cross-bill to foreclose certain mortgages, is less than \$1000, the judgment of the Appellate Court in affirming the decree of the trial court is final, in the absence of a certificate of importance, and a writ of error to the Appellate Court will be dismissed.

**WRIT OF ERROR** to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Coles county; the Hon. J. W. WILKIN, Judge, presiding.

Messrs. CRAIG & CRAIG, for the plaintiffs in error.

Mr. L. C. HANLEY, for the defendant in error Clark.

**Per CURIAM:** This was a bill to foreclose a mortgage. One of the defendants to the bill filed a cross-bill, setting up a second mortgage, and praying for a foreclosure thereof. Moore, another defendant, filed a cross-bill, setting up his rights in the mortgaged premises. On the hearing, the circuit court dismissed the cross-bill of Moore, and decreed a foreclosure of the two mortgages. On appeal to the Appellate Court, the decree was modified as to the dismissal of the cross-bill of Moore, but was affirmed as to the foreclosure of the two mortgages. To reverse the judgment of the Appellate Court, the complainant in the original bill, and the complainant in the cross-bill, sued out this writ of error.

Upon looking into the record, it appears that the amount involved is only \$657, and the record contains no certificate of importance. In a case of this character, where the amount

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Syllabus.

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involved is less than \$1000, in the absence of a certificate of importance the judgment of the Appellate Court is final, and the writ of error will have to be dismissed.

*Writ of error dismissed.*

Mr. JUSTICE WILKIN took no part in this decision.

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THE VILLAGE OF AUBURN

v.

SAMUEL F. GOODWIN *et al.*

*Filed at Springfield April 5, 1889.*

1. TOWN PLAT—*county surveyor's certificate—how far essential.* Under the Revised Statutes of 1845, the county surveyor's certificate to the plat of a town or addition thereto, is a requisite part of such plat, although acknowledged by the proprietor. The plat is entitled to neither acknowledgment nor record until it has been first certified by the county surveyor. His certificate must also be recorded, and form a part of the record. Then, and not till then, does the plat become evidence of title in the corporation to the streets and alleys designated on the plat.

2. The plat or map of a town or addition, under the law of 1845, operates as a conveyance in fee of the streets and alleys to the corporation only by force of the statute. If the plat is not made out, certified and acknowledged substantially as required by the statute, it affords no evidence of title in the corporation to the streets and alleys.

3. SAME—*former decision.* The case of *Gebhardt v. Reeves*, 75 Ill. 305, in so far as it holds that the certificate to the survey and plat of a town or addition thereto may be legally made by a surveyor other than a county surveyor, under the statute of 1845, and in so far as it holds that the acknowledgment and recording of a town plat vests the fee to streets and alleys in the municipality regardless of a compliance with the requirements of the statute as to the survey, plat and certificate of a county surveyor thereto, is in conflict with *Trustees v. Walsh*, 57 Ill. 360, and *Thomas v. Eckard*, 88 id. 596, and is overruled.

4. SAME—*certificate by deputy county surveyor—but to be in the name of the principal.* As county surveyors, under the law of 1845, were au-

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Syllabus.

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thorized to appoint deputies, it follows that the provisions of the statute as to the survey, plat or map, and certificate to the same, will be complied with if it appears to have been done by the county surveyor in person, or by his deputy.

5. But as a deputy officer, as a rule, subject, perhaps, to some special statutory exceptions, derives all his powers and authority from his principal, in all his official acts he must act in the name of his principal. Therefore a deputy county surveyor, acting in his own name, and not that of his principal, in making a survey and plat of a town addition, does not bind the principal, or make his act that of the county surveyor.

6. *SAME—sufficiency as to certainty.* If the plat and certificate of a surveyor are such that a competent surveyor, from the data given, may locate the plat, lots and blocks, streets and alleys, and determine the dimensions of the same, they will be sufficiently definite and certain.

7. *EASEMENT—non-user—presumption of extinguishment.* The non-user of an easement by the public for twenty years affords a presumption of extinguishment, though not a very strong one, in a case unsupplied by circumstances; but if there has been, in the meantime, some act done by the owner of the land sought to be charged with the easement, inconsistent with or adverse to the right, an extinguishment will be presumed.

8. Where the owner of a block of ground in a village has been in the open, adverse and exclusive possession of the alleys running through the same, for more than twenty years, the non-user of the alleys for such length of time will bar a recovery of the same, in ejectment by the village.

9. *EJECTMENT—plaintiff must recover on the strength of his own title.* In an action of ejectment, the plaintiff must recover, if at all, upon the strength of his own title. The legal title alone is involved.

10. *PRACTICE—competency of evidence—how questioned—bill of exceptions.* If a defendant in ejectment desires to raise the question of the competency of the plaintiff's evidence of title, he must incorporate the same into the bill of exceptions, showing an objection thereto and exception to the ruling of the court in admitting the same, and assign cross-errors when the other party appeals, otherwise this court must presume in favor of the ruling of the trial court.

11. *SAME—directing what the verdict shall be.* In an action of ejectment by a village, to recover certain alleys claimed under a statutory dedication by a former owner, by plat, the plat was excluded as evidence, and the plaintiff's own evidence showed such an abandonment or non-user as was sufficient to defeat a recovery. At the close of the plaintiff's evidence, the court, on motion, instructed the jury to find for the defendant: *Held, no error in giving the instruction.*

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Brief for the Appellant.

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APPEAL from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Mr. G. W. MURRAY, and Messrs. GROSS & BROADWELL, for the appellant:

The law in force at the time the plat was executed and recorded, respecting the laying out and platting of towns, was the act of 1833, re-enacted in 1845. (Rev. Stat. 1845, chap. 115, sec. 17.) The effect of the plat was to vest the fee of the streets and alleys in the village.

Every fact contemplated by the law to be shown by the surveyor's certificate is here shown. *Maywood Co. v. Village of Maywood*, 118 Ill. 61.

The law did not require the survey, plat and certificate to be made by a county surveyor. (*Gebhardt v. Reeves*, 75 Ill. 301.) But if it did, it was made by a deputy county surveyor, and his acts bound his principal. Rev. Stat. 1845, p. 573, secs. 4, 5.

A competent surveyor could readily locate the plat, lots, streets and alleys, and therefore the plat is sufficiently definite. *Village of Winnetka v. Prouty*, 107 Ill. 218; *Colcord v. Alexander*, 76 id. 581.

The plaintiff had the right to resort to parol evidence to sustain the grant. *Colcord v. Alexander*, 76 Ill. 581; *Williams v. Warren*, 21 id. 541; *Stevens v. Wait*, 112 id. 544; *Grier v. Puterbaugh*, 108 id. 602.

Appellees can not question the ruling of the court admitting in evidence the certificate of entry and deed from Newkirk. Before they could do so, they must have preserved their exception in the bill of exceptions, and assigned cross-errors upon the record thereon. If they would claim that these instruments affecting title were improperly admitted in evidence, they should have set them out in the bill of exceptions. *Lee v. Mound Station*, 118 Ill. 304; *McLaughlin v. Walsh*, 3 Scam. 185; *Ballance v. Leonard*, 37 id. 43; *Hayes v. Lawson*, 83 id. 182.

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Brief for the Appellees. Opinion of the Court.

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Messrs. CONKLING & GROUT, for the appellees:

It nowhere appears that the papers offered in evidence were not sufficient to sustain the verdict and judgment below. *Roger v. Hall*, 3 Scam. 5; *McLaughlin v. Walsh*, 3 id. 185; *Ballance v. Leonard*, 37 Ill. 43; *Hayes v. Lawyer*, 83 id. 182; *Lee v. Mound Station*, 118 id. 312.

The plat is not sufficient, upon its face, to locate the property sought; nor is there any sufficient conveyance of the alleyways, and the plat was not sufficiently certified. Rev. Stat. 1845, p. 115, chap. 25, secs. 17-21.

The plat was made by a deputy; but if the work was done by him, the certificate and return should be made in the name of the principal. 1 Blackstone's Com. 344, 345; *Glencoe v. People*, 78 Ill. 382; *Ryan v. Eads*, Breese, 217.

The expression used in *Gebhardt v. Reeves*, 75 Ill. 301, relied on by appellant, may be considered *obiter dictum*. See *Thomas v. Eckard*, 88 Ill. 596.

An acceptance is necessary to vest title under a plat. *Littler v. City of Lincoln*, 106 Ill. 353; *Village of Winnetka v. Prouty*, 107 id. 225; *City of Peoria v. Johnson*, 56 id. 51.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

At the time of the bringing of this suit, appellees were in possession of block 3, in Buck's addition to the town of New Auburn, having it enclosed by a continuous fence. Appellant claims title in fee, to alleys running north and south and east and west through the center of said block, by virtue of a statutory dedication, claimed to have been made by John and Avis Buck, in January, 1858, and brings this action in ejectment to recover possession of the same.

On the trial, appellant offered in evidence a certificate by the Auditor of State, showing the entry of the land on which it is claimed the dedication was made, by Matthew Newkirk, October 24, 1835, and a deed from said Newkirk for the same,

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Opinion of the Court.

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to John Buck. An objection to each of these was interposed by appellees, and overruled. It then offered a plat of Buck's addition to the town of New Auburn, together with certain certificates thereto attached, but on objection it was held incompetent, and excluded. Previous to the introduction of this documentary proof, appellant offered parol evidence, and, among other witnesses, introduced and examined appellee Samuel F. Goodwin, who testified that he owned and enclosed the south half of said block as early as 1858, at which time he erected a fence through the center of the block, east and west, and has maintained the same ever since; that in the year 1866 he also enclosed the north half, and has since maintained the same. He also testified that no alleys were ever opened or used through said block, or at any time claimed by the village, except that a street commissioner thereof gave him notice to open shortly prior to the bringing of this suit. There is no testimony whatever tending to prove that the village authorities, at any time, claimed title or attempted to assert its right to the alleged alleys prior to the notice above mentioned, nor is the evidence of said Goodwin as to his exclusive, uninterrupted possession of the said block 3, including these alleys, if they ever existed, in any manner contradicted or impeached. The above mentioned plat having been excluded, the court below, at the request of appellees, instructed the jury to return a verdict for defendants, which being done, judgment was rendered thereon. No evidence was introduced by appellees, and no offer was made by appellant to introduce further evidence on its behalf after the adverse ruling as to the admissibility of said plat.

Appellant insists upon a reversal on the single ground that the court below erred in taking the case from the jury, and it treats that ruling as based on the exclusion of the plat alone, whereas appellees insist, that, independent of the question of its competency, the instruction to find in their favor was proper, both because, as they say, the evidence fails to show

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Opinion of the Court.

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title in John Buck to the land alleged to have been platted, and because there is no proof of an acceptance by the village authorities.

Among other objections urged to the plat in the court below, it was insisted that it was not shown to have been certified to by a county surveyor, and that it was void for uncertainty. Deeming all other objections untenable, and of no importance in the decision of the case, we shall notice but the two named.

The addition being laid off in 1858, in order to become valid must have conformed to the requirements of chapter 25 of the statute of 1845. Section 17 of that chapter provides that the proprietor of a town or addition "shall cause the same to be surveyed, and a plat or map thereof made by the county surveyor, if any there be, of the county in which such town or addition is situated; but if there be no county surveyor in the county, then, in that case, by the county surveyor of an adjoining county." Section 20 provides that the plat or map, after having been completed, shall be certified by the surveyor and acknowledged by the proprietor, which certificate of the surveyor, and acknowledgment, shall be recorded, and form a part of the record. The following section (21) provides that "the plat or map, when made out, certified, acknowledged and recorded, as required by this division, \* \* \* shall be deemed, in law and equity, a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, and shall be considered, to all intents and purposes, as a general warranty against such donor or donors, their heirs and representatives, to the said donee or donees, grantee or grantees, for his, her or their use, or the uses or purposes therein named, expressed or intended, and for no other use or purpose whatever. And the land intended to be for streets, alleys, ways, commons or other public uses, in any town or city, or addition thereto, shall be held in the corporate name thereof, in trust, to and for the uses and purposes set forth or expressed or intended."

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Opinion of the Court.

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The certificate of the surveyor to the plat in question is signed, "Cortes Fessenden, Dep't. Surveyor, S. Co.," and it is objected, on behalf of appellees, that this is no compliance with the sections of the statute above quoted. Counsel for appellant insist that so much of the statute as requires the plat or map to be made by a county surveyor may be wholly ignored, and the plat have all the force of a statutory conveyance of the streets and alleys to the municipality though made by one not a county surveyor, and in support of this position cite *Gebhardt v. Reeves*, 75 Ill. 305. While a part of the language used in that case justifies the position assumed, it was unnecessary in the decision of that case. The language must have been used under a misapprehension of the scope of the authorities on which it was based, is in conflict with *Trustees et al. v. Walsh et al.* 57 Ill. 365, and *Thomas v. Eckard et al.* 88 id. 596, and in so far as it holds that the certificate to the survey and plat may be legally made by a surveyor other than a county surveyor, under the statute of 1845, and in so far as it may seem to hold that the acknowledgment and recording of a town plat vests the fee to streets and alleys in the municipality, regardless of a compliance with the requirements of the statute as to the survey, plat and certificate of a surveyor thereto, that case is overruled. By the very terms of the statute, the surveyor's certificate is a requisite part of the plat, when acknowledged by the proprietor. The plat is neither entitled to acknowledgment or record until it has first been certified by the surveyor. His certificate must also be recorded, and form a part of the record. Then, and not until then, does it become evidence of title. Here the legal title alone is involved. As in every action of ejectment, the plaintiff must recover, if at all, upon the strength of its legal title. The plat or map operates as a conveyance in fee of streets and alleys to the corporation only by force of the statute, and when it requires that it shall be "*made out, certified, acknowledged and recorded, as required by this division,*"

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Opinion of the Court.

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to have the effect of a conveyance, it is not within the province of a court to say it shall become a muniment of title notwithstanding a plain requirement has been ignored. In 57 Ill. 365, *supra*, it was said the plat of Laflin and Dyer's subdivision was introduced in evidence. It purports to have been acknowledged by the proprietors and recorded, but it was not, nor is it claimed to have been, made in conformity with the statute as to the mode of laying out towns and making additions thereto. No statutory effect can therefore be accorded to the plat. In 88 Ill. 596, *supra*, it is held, that to become valid and binding as a town plat, all of the requirements of the statute must be substantially complied with, and one of the defects pointed out in the plat then before the court was, that it did not appear to be certified to by the county surveyor. The cases cited in the opinion in *Gebhardt v. Reeves*, *supra*, as holding that the acknowledgment and recording of the plat operate as a conveyance, are in harmony with this view. They each contemplate the making out and certifying, which, by the statute, are made prerequisites to the acknowledgment and recording.

The next question, then, is, does it sufficiently appear that this certificate was, in legal effect, made by the county surveyor? That the statute then in force authorized the appointment of deputies by county surveyors, is not questioned. That statute also provided that county surveyors should make all surveys within their counties that they were called upon to make, either by themselves or deputies properly authorized, and it must therefore be conceded that the provisions of the statute as to the survey, plat or map, and certificate to the same, would be complied with if it appeared to have been done by the county surveyor in person, or by his deputy. It is well understood that a deputy derives all of his power and authority from his principal, and can only act for and in his place, and must act in his name. While there are exceptions to this rule, growing out of peculiar statutory provisions, we

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Opinion of the Court.

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know of none which would authorize the sustaining of the certificate in question. In *Ryan v. Eads*, Breese, 217, it was said a deputy sheriff can only act in the name of his principal, and a default taken upon a return by one who signed himself deputy sheriff, was set aside. Also, in *Ditch v. Edwards*, 1 Scam. 127, the return to a summons signed by a person as deputy sheriff, without using the name of the sheriff, was held to be no return. The same doctrine is announced in *Village of Glencoe v. The People*, 78 Ill. 384. We are of opinion, therefore, that the deputy surveyor, attempting to act in his own name, and not that of his principal, in no way bound the county surveyor, nor did he, within the meaning of the statute, make his act that of the county surveyor. It is to be observed that the present statute is different from that of 1845, in that it only requires the plat and certificate to be made by a competent surveyor.

In support of the objection as to uncertainty, it is insisted that the plat and certificate of the surveyor are so indefinite and uncertain as to render it void, and that it is impossible, from them, to locate the alleys in question. Unquestionably, the surveyor, by a little more care and diligence, could have made that directly clear and certain, which we are only able to attain indirectly or by a process of reasoning. Still, if the latter is practicable, so that a competent surveyor, from the data given, could locate the plat, lots and blocks, streets and alleys, and determine the dimensions of the same, it would be sufficient, and we think that degree of certainty does appear here. The plat was, however, properly excluded, because it was not certified by a county surveyor, or in the name of a county surveyor by his deputy.

But could appellant have recovered on the proof made, even if the plat had been regular, and admitted in evidence? The question of proof of title in John Buck, attempted to be raised by appellees, is not before us. The record does show that proof of such title was made. The competency of that evi-

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Opinion of the Court.

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dence could only be questioned here by appellees, by having had it incorporated in the bill of exceptions, showing their objection thereto, and exceptions to the ruling of the court in admitting it, and then assigning cross-errors, all of which has been omitted. In the present state of the record, we must presume in favor of the competency of the proof and the correctness of the ruling of the trial court.

The other point made by appellees in support of the instruction to find in their favor, properly stated, must, in our opinion, be sustained. It is not, however, so much on the ground of a failure to prove acceptance by the village authorities, as that by its own evidence it has shown such an abandonment or non-user as will defeat its recovery. "Mere non-user for twenty years affords a presumption of extinguishment, though not a very strong one, in a case unaided by circumstances; but if there has been, in the meantime, some act done by the owner of the land charged with the easement, inconsistent with or adverse to the right, an extinguishment will be presumed." (3 Kent's Com. p. 448.) This text is quoted with approval, and applied to a municipal corporation attempting to recover possession of a strip of land claimed as part of one of its streets, in *City of Peoria v. Johnston*, 56 Ill. 51. It is there said: "Conceding this highway was laid out as claimed by appellant, and conceding there was an intention to dedicate the premises on the south-east of section 4, we are of opinion that the adverse possession of appellee, open and exclusive as it has been, and the complete non-user of the easement by the public for more than twenty years, are a sufficient answer to the claim now made by the city."

In *Village of Winnetka v. Prouty*, 107 Ill. 218, which was a bill in chancery to enjoin the village from entering a certain enclosure for the purpose of opening a street, it was shown that the enclosure had remained for more than twenty-one years, and the village had at no time attempted to take possession of the alleged street. After commenting upon the plat

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Syllabus.

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relied upon by the village, it is said: "There was, therefore, as we understand this record, no definite statutory dedication of any particular quantity of ground for this street, and the proof fails to show a common law dedication. Indeed, we are inclined to the belief that if the proof in respect to the plat were free of objection, the evidence shows such an abandonment by the public as would now preclude the opening of the street." This doctrine is supported by other decisions of this court, and the evidence in the case before us brings it clearly within the rule announced. The alley running east and west, and the south half of that running north and south, have been in the open, adverse and exclusive possession of appellees for nearly thirty years, and the whole of the one north and south for more than twenty years prior to the bringing of this suit. We are of opinion that there has been such non-user on the part of appellant as to bar its right of recovery, and that in any view of the case, as shown by the proof, the instruction to find for defendants was right.

*Judgment affirmed.*

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WARREN C. WINGET *et al.*

v.

THE QUINCY BUILDING AND HOMESTEAD ASSOCIATION.

128	87
63a	81
60a	153
128	67
166	130
128	67
173	625
173	631

*Filed at Springfield April 5, 1889.*

1. **BUILDING ASSOCIATIONS—act of 1872—constitutionality—special law regulating interest.** The 10th section of the Building Association act of 1872 is not in conflict with the provisions of section 22 of article 4 of the constitution, which prohibits the General Assembly from passing any local or special laws regulating interest on money.

2. **SAME—regulations in respect to loans—validity.** Rules of a building association organized under the act of 1872, that no loans shall be made except to members; that loans shall be put up at auction, and struck off to the members bidding the highest premium; that every share of stock shall be subject to a lien for the payment of unpaid in-

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Statement of the case.

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stallments and other charges incurred thereon; and that no stockholder shall withdraw from the association whose stock is held in pledge for security, are authorized by the statute, and are therefore legal and valid.

3. So a by-law providing that when the shares of stock of any series upon which a loan should be granted should reach the matured value of \$100 each, the value of the stock should be credited to the account of the borrowing member, is valid, and warranted by the act. By this mode the loan is satisfied and discharged, and the stock so credited is cancelled, and reverts to the association.

4. SAME—*fraud—representations to induce member to take a loan.* A building association, by its circulars, set out the advantages of its financial scheme to men of small income. The representations were mostly laudatory, and in many respects the expression of opinion, but none of them, as to any material fact, were shown to be untrue. The party seeking to rescind his contractual relation with the association, on the ground that he was misled, and thereby defrauded, by becoming a member, had a copy of the charter and by-laws of the association, in which the rights and obligations of members, etc., were fully stated. His failure to realize the contemplated benefits represented was owing to his own imprudence and neglect: *Held*, not such a fraud as to justify a rescission of the contract with the association.

5. ESTOPPEL—to question validity of corporation. A party who has contracted with a corporation *de facto*, as such, can not be permitted, after having received the benefits of his contract, to allege any defect in the organization of such corporation, as affecting its capacity to enforce such contract, but all such objections, if valid, are available only on behalf of the sovereign power of the State. This rule applies when the corporation is organized under a law alleged to be unconstitutional.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. WILLIAM MARSH, Judge, presiding.

This was a bill in chancery, brought by Warren C. Winget and Sarah M. Winget, his wife, against the Quincy Building and Homestead Association and William S. Flack, surviving trustee, to enjoin the sale of certain premises under the powers of sale contained in two deeds of trust executed by the complainants. The Quincy Building and Homestead Association is a corporation organized under the provisions of the "Act to

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Statement of the case.

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enable associations of persons to become a body corporate to raise funds to be loaned only among their members," approved April 4, 1872.

Said act, after prescribing the mode in which corporations might be organized for the purposes therein specified, provided, among other things not material here, that such corporations should make no loans except to their own members; that their shares of stock should be for \$100 each, and that subscriptions therefor should be made payable to the corporation at such time or times as should be provided by the charter and by-laws, but that no periodical payment should exceed two dollars on each share; that every share of stock should be subject to a lien for the payment of unpaid installments and other charges incurred thereon under the provisions of the charter and by-laws, and that the by-laws might prescribe the form and manner of enforcing such lien; that new shares of stock might be issued in lieu of the shares withdrawn or forfeited, and that the stock might be issued in one or in successive series, in such amount as the board of directors might determine; that any shareholder wishing to withdraw from the corporation should have power to do so by giving thirty days notice of his intention so to do, and that he should be entitled to receive the amount paid by him and such interest thereon as the by-laws might determine, less all fines and other charges, but that no stockholder should be entitled to withdraw whose stock was held in pledge for security.

It was further provided that the money in the treasury, if over \$100, should be offered for loan in open meeting at the meetings of the board of directors, and that the stockholder who should bid the highest premium for the preference or priority of loan should be entitled to receive a loan of \$100 for each share of stock held by him, and that good and ample security should be given by the borrower for the repayment of the loan; that in case of non-payment of installments of interest by a borrowing stockholder for the space of six months,

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Statement of the case.

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payment of principal and interest, without deducting the premium paid or interest thereon, might be enforced by proceeding against the securities according to law; that a borrower might repay a loan at any time, and in case of such repayment before the expiration of the eighth year after the organization of the corporation, there should be refunded to him one-eighth of the premium paid for every year of said eight years then unexpired. It was also provided that no premium, fines or interest on such premium that might accrue to the corporation according to the provisions of said act should be deemed usurious, and that the same might be collected as any other debts of like amount might be collected by law in this State. Laws of 1872, page 173.

The Quincy Building Association was organized in April, 1874, its object, as declared by its charter, being, the accumulation of a fund by monthly contributions, fines, premium on loans and interest on investments, sufficient to enable the stockholders to build or purchase for themselves dwelling houses or improve real estate, or make such other investments as they might deem advantageous. A charter and by-laws were adopted in pursuance of which the stock of the corporation was divided into series, that issued for each year constituting a separate series, and it was further provided by the charter and by-laws that each stockholder, at the time of subscribing for stock, should sign his name to the charter, and that no member should own more than fifty shares in his own right; that the stock should be paid for in monthly installments of fifty cents per share, and that in default of payment of an installment at maturity, the stockholder should pay a fine of ten cents on a dollar or fraction of a dollar remaining unpaid, and that if the default in the payment of installments should continue six months, the stock should be forfeited, and the stockholder be entitled to receive the amount of installments previously paid in, after the deduction of all fines, and without the allowance of any interest; and that the payment of installments should

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Statement of the case.

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continue until, with accumulated profits, the stock belonging to the series should be worth \$100 per share.

It was also provided that each stockholder should be entitled to receive, for each share of stock held by him, a loan of not more than \$100, such loan to be disposed of to the highest bidder for priority of right, in open meeting at stated meetings of the board of directors, interest to be paid at the rate of one-half per cent per month on the entire loan including the premium; that the repayment of such loan should be secured by bond and mortgage on real estate, clear of incumbrance, and that every share of stock upon which a loan should be effected should be transferred to the association as collateral security; that any stockholder might withdraw from the association upon giving thirty days notice of his intention so to do, and that he should then be entitled to receive the amount paid in by him and six per cent interest thereon, less all fines and other charges, but that no stockholder should be entitled to withdraw whose stock was held in pledge for security; that when the shares of stock of any series, upon which a loan should have been granted should reach the matured value of \$100 each, the amount or value of such stock should be credited to the account of the borrower owning the same, and that the loan should be declared to be fully paid and satisfied and the stock cancelled.

On and for some time prior to the 3d day of May, 1876, the complainants were the owners as tenants in common of a certain lot of land in the city of Quincy with certain buildings thereon, and claimed by them as their homestead. Complainant Warren C. Winget was desirous of obtaining a loan of money from said association on the security of said lot, and in order to become a stockholder so as to be qualified to apply for such loan, he purchased and procured an assignment to himself from another stockholder of sixteen shares of stock of the second series, upon which installments to the amount of \$88 had been paid. The certificate of stock thus purchased

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Statement of the case.

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was surrendered to the association, and a new certificate for sixteen shares was issued by the association to him. Winget thereupon made an application in writing to the association for a loan and appeared at a stated meeting of the board of directors and became a bidder for priority of right. His bid, which was thirty-eight per cent premium, was successful, and he thereby became entitled to a loan of \$1600, less the premium bid, being the net sum of \$992. The association thereupon paid over to him said sum of \$992, and he assigned to the association his sixteen shares of stock as collateral security for said loan, and also executed his promissory note, bearing date May 3, 1876, by which he promised to pay to the association, said sum of \$1600, eight years after date, with interest at the rate of one-half per cent per month, payable monthly, and also all monthly dues and fines on his sixteen shares of the capital stock of the association, his wife signing the note with him as his surety. To secure said note, said Winget and wife, on the same day, executed a deed of trust, by which they conveyed said lot to Rufus L. Miller, as trustee, and to William S. Flack, his successor in trust, with power of sale in case of default for six months in the payment of the moneys mentioned in said promissory note or any portion thereof. At the time of making the loan, the association delivered to Winget a pass-book, in which it afterwards entered credits for all moneys paid by Winget as such payments were made, and which contained a printed copy of the charter and by-laws of the association. This pass-book remained in his possession down to the commencement of this suit.

On the 6th day of November, 1878, Winget desiring to obtain a further loan on the same property, subscribed for four shares of stock of the fifth series and became a successful bidder for a priority at thirty-one per cent premium, and received from the association the net sum of \$276, and assigned to the association as collateral security for said loan said four shares of stock and executed to the association his note for \$400,

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Statement of the case.

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of like tenor with his former note, his wife also signing it as surety, and both joined in executing a second deed of trust on said lot to the same trustees, with like power of sale.

Winget, though frequently in default, so as to subject himself to the payment of fines, paid the installments on both certificates of stock, the interest on both notes, and the several fines incurred, down to February, 1882. The amounts paid by him on account of the first loan were as follows, viz: installments on the sixteen shares of stock \$640, interest on the \$1600 note \$560, and fines \$62.40. The amounts paid on account of the second loan were as follows, viz: installments on the four shares of stock \$88, interest on the \$400 note \$78, and fines \$12.70. The total amount of payments, including fines, was \$1441.10. In February, 1882, he ceased making payments and sought to withdraw from the association, but he was not permitted to do so except upon terms which he was not willing to accept. After his payments had become more than six months in arrears, on application of the association, Flack, the successor in trust, Miller the trustee being dead, advertised said lot for sale under the powers in said deeds of trust, to pay the balance claimed by the association to be still due on said notes and deeds of trust. The balance claimed to be due on the two notes and for which the sale was advertised was \$1082.55.

One of the principal grounds for relief alleged in the bill is, that complainants were induced to accept said loans and execute said deeds of trust through mistake and misunderstanding caused by false, and fraudulent representations by said association, its officers and agents. The evidence in relation to the representations alleged is to a considerable degree conflicting. Said representations consisted in part of certain printed statements and circulars issued and distributed by the association, and in part of oral statements claimed to have been made by the officers and agents of the association to the complainants at or prior to the execution of the deeds of trust.

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Statement of the case.

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Of the former, a printed circular was produced and identified, and those portions of it which were deemed material were read in evidence and are as follows:

"Within the past few years Building Associations have been organized in the west, and naturally they are new, and the people are as yet unacquainted with the work and the benefits they accomplish. The name Building Association is a misnomer. Strictly speaking they are mutual savings and loan associations, loaning the money invested by their members to their members only.

"The Quincy Building and Homestead Association organized in May, 1874, has been before the people of Quincy for the past nine years, and has been the means of assisting a large number of workingmen to gain them a home by means of monthly payments equal to paying rent. And you will ask how is this done?

"The association issues a series of stock on the first Tuesday of June annually, each share of stock being of the value of \$100 when par. Any person can subscribe from one to fifty shares of stock, and by paying on each share the sum of fifty cents monthly, will realize the full value of \$100. You will ask, how can fifty cents paid monthly, say for nine years, which would be \$54, realize \$100? It is done in this way: The money which is paid monthly is loaned to the members and the interest received on their loans is also paid monthly, hence the association compounds the interest twelve times per year, besides fines which are collected from delinquent members. Every one knows what results can be obtained by the loan and re-loan of money during a series of years. The profits are equally divided among the shareholders without preference. The expense of management is small, the directors giving their time, and the secretary and treasurer are only paid a nominal salary. Now by what means can a home be secured?

"The association is in itself a philanthropic institution, and being of itself purely mutual, invites the laborer, mechanic,

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Statement of the case.

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clerk and tradesman to share and assist each other in procuring a home. This association does not build houses, but helps those who help themselves in procuring one for them, the object being to loan to worthy mechanics, laborers and others sufficient money in the erection of a house, and to protect all its members, it is necessary that the association require security of all borrowers. Suppose you own a lot but have not the requisite amount of money necessary to build a house. The association will loan a sufficient amount to do so; or perhaps you have neither a lot or sufficient money to purchase one, but still it may be your desire to have your own house. You can do this by subscribing for stock and paying thereon until it is worth say \$200. You can then withdraw the same from the association and with that money apply it in the purchase of a lot; or you can borrow from the association that amount by pledging the stock as security, or you can borrow a larger amount by giving the property as security, and with the surplus build your house. The association always takes into consideration the value of your stock when making a loan.

"Besides this, many worthy persons can not borrow from money loaners or brokers a sufficient sum to enable them to build or purchase a house, as they require nearly double the amount as security, besides not loaning for a longer period than two or three years, a period of time not sufficient for a laboring man with a limited income to repay the loan, and they will not receive part of the principal to convenience the borrower and to lessen his interest before the note has matured. Many people have a mortgage on their property which not alone has proved burdensome to them, but with a small income have found it impossible to repay it, and are obliged to make new loans when the old ones have become due, so as not to lose their property. To those this association offers a welcome, for by taking stock in this association and borrowing thereon, they can in a few years, by small monthly payments, rid themselves of a burden which has been to them a source

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Statement of the case.

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of anxiety. The record of this association for the past nine years speaks for itself. Hundreds of men have been and are now aided in the procurement of a home, and who, without the aid of the association, would now have no home of their own, but would be still paying rent.

"Every one knows what good influences are brought to bear in a community where the laboring classes are thrifty. Where every man has his own home a better class of citizens are always to be found. All that many of our laboring men are in need of is encouragement to become thrifty and to become their own landlords. In this the Quincy Building and Homestead Association now offers an opportunity. If at present you have not enough means to begin a purchase of a home, you may make an effort to save a few dollars a month for a beginning. Take shares in the association, as many as your income may permit you, and you will find in a short time that you will have a nucleus to buy a home; but if at any time you find that you are unable to meet your payments, you have the privilege to withdraw your stock. The association will return you the money you have paid at any time with six per cent interest thereon for the time invested. So you will then find yourself a gainer by having saved so much.

"To a great number of persons the ordinary method of paying so much a month is the easiest and most natural way of investing. They know their income, and they know what they can save out of it, and in a short space of time they find themselves possessed of a considerable amount which they very likely would not have, had they not invested small sums.

"Practically and in brief, the system operates to assist men of small means or small income to secure homes for themselves and their families, by paying small sums into a common treasury, to be loaned in such manner that principal and interest may be paid monthly instead of rent. The plan is simple. The theory is financially sound, and experience has demonstrated the material advantages which may be derived from

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Statement of the case.

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these corporate societies. Thus every member is both stockholder and depositor, and contributes to the management, to the capital stock and to the profits, while enjoying the use of the society's money.

"But in addition to the pecuniary benefits reaped from organizations of this kind, there are doubtless influences exerted upon their membership of even greater importance, both to the individual and to society. Men possess an instinctive desire to advance in life which governs all their actions, and needs only to receive the right direction. Given an opportunity to make small beginnings in thrift, and in proportion as men acquire habits of temperance and economy and begin to accumulate money or property, they become possessed with the dignity of citizenship, have new respect for themselves and the rights of others, and become identified through self interest with law, order and public stability.

"Such opportunities the Building and Loan Associations offer to the classes most in need of them. Capitalists can not monopolize them or divert them from their legitimate channels. All possible safeguards are thrown around them by the State laws, which specify the details of management, the limits of salaries and expenses, and place the control directly in the hands of the membership."

Another circular entitled "The Workingman's Way to Wealth," was inserted in a pamphlet containing the charter and by-laws of the association, and in that circular, the advantages of the system of loan and homestead associations provided for by the act of 1872, and especially those offered by the defendant association, were set forth as follows:

"It admits each individual member to a full, free and unrestricted voice in the management of associations formed under it, and a constant oversight of its operations and affairs.

"It is entirely mutual and equal in distributing its benefits, giving to all its members their equal portion of all its profits and gains.

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Statement of the case.

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"It is much more liberal in its return of profits and gains than any other plan of saving and accumulating from small sums of money, having no preferred class to share its profits, and no necessity for expensive banking houses and clerk hire, and it is the only plan by which the workingman can become his own capitalist, and create a source of wealth from which he can supply all reasonable demands without the aid or interference of the outside capitalist. In short, it is a system 'of the people, by the people and for the people.'

"Every one owning stock in this association is entitled to a loan of \$100 for each and every share he may own, which is a permanent loan, provided for by the charter and by-laws of this association, thus enabling the workingman to anticipate his wants and provide for his family immediately, a task requiring long years of labor and saving under any other plan.

"Every stockholder, should he desire to withdraw, is assured by the charter of the repayment of the amount he pays into the association and legal interest.

"There is no separate class, and no advantage gained by one member over any other member."

In addition to these printed statements, evidence was given tending to show that the officers and agents of the association, made various statements and representations touching the advantages of being a stockholder in and a borrower from the association. The oral representations of which complaint is made, as collected and grouped together by counsel for the complainants in his brief, were as follows: "That it was cheaper to obtain a loan through the association than elsewhere; that it could be had at less than legal rates, and that he could pay it back in small amounts, which would render it easier for him than to pay it in a gross sum; that he would receive back in cash the discount or bonus he might bid and give notes for in excess of the money actually paid him, when his stock came to par; that complainants could pay off the loan at any time they wished to do so, by repaying the money

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Statement of the case.

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actually received and six per cent interest on it; that all the gains and profits of the association would be equally divided among all the stockholders without preference, when the stock in a given series in which the member held stock became par; that it was his duty to join the association and to obtain the money he wanted from it; that it was the easiest and best way for a poor man to obtain a home for his family."

The complainants' evidence tends to show that certain representations of the character above indicated were made to the complainants by Morton the secretary of the association, Miller its attorney and Nichols an assistant in the secretary's office. At the time the bill was filed Morton and Miller were dead, but Nichols was called as a witness and he directly disputed the complainants' testimony as to the representations claimed to have been made by him or in his presence.

The master found that the evidence as to the oral representations alleged in the bill was conflicting and unsatisfactory; that contradiction of the complainants' testimony in relation to the statements of Morton and Miller was impossible as they were dead, but that he was unable to find from the evidence that Morton, Miller or Nichols made the statements attributed to them except so far as such statements corresponded with the printed statements and circulars issued by the association and offered in evidence.

The master found however that Winget became a member of the association and a borrower, and that he and his wife executed and delivered to the association the notes and deeds of trust in controversy, relying upon and putting faith in the representations made by the association, through its officers and agents, and through its printed publications and circulars, that it would be better and cheaper to take a loan from the association than to borrow elsewhere; that all the profits of the association would be shared equally by all the members; that it was a philanthropic and benevolent institution to aid mechanics and poor men to gain a home, and that its funds

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Brief for the Appellants.

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were to be loaned only among its members, and that said representations were false and untrue.

The court thereupon entered a decree confirming the master's findings above set forth, and rescinding and vacating Winget's said certificates of stock in said association, and the contracts between him and the association which resulted in the association issuing to him and his accepting said certificates of stock, on the ground that Winget was induced to become a member of said association and take stock therein by false and fraudulent representations; and decreeing that the complainants were entitled to an accounting with said association upon the basis of the repayment by the complainants to the association of the moneys actually advanced by the association to Winget, with interest thereon at the rate of six per cent per annum, and crediting the complainants with all moneys paid by them or either of them to the association as installments of the shares of stock, interest or fines. The court thereupon stated the account between the parties from the evidence reported by the master, and it appearing from such statement of the account that the complainants had more than paid said moneys loaned by the association to Winget and interest thereon as aforesaid, a decree was entered perpetually restraining the association from further attempting to enforce said deeds of trust, and ordering said deeds of trust and notes to be surrendered up for cancellation, and also directing that all the costs of the suit be taxed against said association. On appeal to the Appellate Court this decree was reversed and the cause remanded with directions to dismiss the bill for want of equity. By a further appeal the record is brought to this court for review.

Mr. GEORGE W. FOOG, for the appellants:

A false representation of any material fact, made by one party, and the other, in ignorance of the truth, and in good faith, relies upon such false representation, and is thereby in-

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Brief for the Appellants.

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duced to enter into a contract to his injury, will vitiate and avoid the contract, and if the injured party offers to rescind, and invokes the aid of a court of chancery, relief will be granted, and the parties restored to their original *status*. *Baker v. Rockabrand*, 118 Ill. 365.

Though the mistake may not be material, if it be such that the minds of the parties never met upon a material point, and the parties can not be put *in statu quo*, equity will rescind the agreement. 1 Story's Eq. Jur. sec. 138, note 3, secs. 142, 193, 185, and note.

As to what is such a *suggestio falsi*, in contemplation of a court of equity, see 1 Story's Eq. Jur. secs. 187-190.

It is the suppression or misunderstanding of a material fact, and not the intent to defraud, that gives a court of equity the right to rescind and abrogate the agreement of the parties. 1 Story's Eq. Jur. secs. 193, 193a.

The general rule is, that an act done or contract made under a mistake, or in ignorance of a material fact, is voidable in equity. 1 Story's Eq. Jur. sec. 140.

No matter what may be the form of a fraudulent transaction, nor however plausible it may be upon its face, a court of equity, with its utmost acuteness, will seek to discover the real motive or intention of the parties. *Hale v. Bryant*, 109 Ill. 34.

It is not necessary that the false representation should have been the sole or even the predominant motive. It is enough if it had material influence upon the plaintiff, although combined with other motives. *Safford v. Grout*, 120 Mass. 20; *Matthews v. Bliss*, 22 Pa. 48; *Hough v. Richardson*, 3 Story, 659; Pollock's Pr. of Con. 500.

Corporations are bound, to the same extent as are individuals, to a careful adherence to truth in their dealings, and they can not, by false representations, involve others in onerous engagements, and then defeat those expectations which their conduct has occasioned. *Zabriske v. Railroad Co.* 23 How. 381; *Moran v. Miami County*, 2 Black. 722.

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Brief for the Appellee.

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A stockholder drawn into taking shares in a corporation by the misrepresentation of its officers, can not be held to his contract, and the same doctrine applies to all the agents of a corporation. 1 Story's Eq. Jur. secs. 193, 193a; Pollock's Pr. of Con. 503-505.

That the loan in this case is usurious, see *Fitzsimmons v. Baum*, 44 Pa. St. 32; *Ernest v. Harkins*, 100 id. 551; *Evans v. Rigby*, 13 S. & R. 218; 46 Ga. 166; 41 id. 451; 54 id. 474; 69 Am. Dec. 161; *Delano v. Rood*, 1 Gilm. 690; *Hunter v. Hatch*, 45 Ill. 178; *Loveland v. Ritter*, 50 id. 54; *Columbia Building Association*, 78 Am. Dec. 463.

Messrs. EMMONS & WELLS, for the appellee:

A party seeking to avoid his contract for fraud must be free from negligence, (Wharton on Evidence, sec. 932,) and the evidence of the fraud must be clear and strong. *Fawcett v. Celoveer*, 109 Mass. 79; *Walker v. Hough*, 59 Ill. 375.

A knowledge of the falsity of the representation must rest with the party charged with the making of it, and he must use some means to deceive or circumvent. *Douglass v. Littler*, 58 Ill. 342; *Sims v. Kline*, Brew. 302.

If the acts of the officers of the association were mere assurances or expressions of an opinion, and not a misrepresentation of fact, however mistaken their belief has proven to be, there is no ground for holding such acts to be fraudulent. 2 Law and Eq. Rep. 401.

The false representation of an officer is not that of the company, even if made at the office. To become the act of the company, it must be contained in a report of the company adopted at a regular meeting. Redfield on Railways, p. 592, sec. 12; *In re Royal British Bank*, 3 L. S. (N. S.) 843.

Fraud, like any other fact, must be proven, and should not be inferred from mere expressions of opinion as to the merits of building associations. But representations false in fact, if innocently made by a party believing in the truth of what he

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Opinion of the Court.

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said, will afford no ground for relief. The concurrence of fraudulent intents and false representations, and damage resulting therefrom, constitute the ground of action. *Lamm v. Homestead Association*, 49 Md. 233.

It is now well settled that there can be no fraud without dishonest intention. Therefore, however false may be the representations of one party to another to induce him to make a contract, there is no ground for avoiding it as obtained by fraud, if the party making the representations honestly believed them to be true, although other remedies are sometimes available for damages. *Cooper v. Lovering*, 106 Mass. 78.

If the representations were honestly made, then they must relate to the substance of the whole consideration, in order to be relieved; otherwise, if the representations are fraudulently made. *Street v. Blay*, 2 B. & Ad. 456.

Ordinarily, statements of a general character, made by either of the parties pending a negotiation for the sale of property, relating to its value, will not afford any ground for avoiding the sale, although false, and made with a fraudulent intent. *Dillman v. Nadlehofer*, 119 Ill. 567; *Smoke Consuming Co. v. Lyford*, 123 id. 300.

Dealer's talk, although false, is not actionable. *Kimball v. Bangs*, 144 Mass. 321.

Fraud must be proved, and proved as it is alleged. Kerr on Fraud and Mistake, 382, 383.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

One of the grounds upon which the complainants seek to be relieved from the legal consequences of Winget's membership in the Quincy Building and Homestead Association, and from the obligations created by the notes and deeds of trust executed by them to said association is, that the association has no valid legal existence. In support of this contention they insist that the act of 1872 under which said association was

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Opinion of the Court.

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organized is unconstitutional and void, because the entire scope of the act, as is claimed, is not sufficiently expressed in the title. On this point it is sufficient to say, that whatever may be the fact in relation to the valid legal existence of said association as a corporation, the complainants are not in a position in which they can be permitted to challenge its validity. A party who has contracted with a corporation *de facto* as such, can not be permitted, after having received the benefits of his contract, to allege any defect in the organization of such corporation, as affecting its capacity to enforce such contract, but all such objections, if valid, are available only on behalf of the sovereign power of the State. 2 Morawetz on Corporations, sec. 750, and authorities cited in note. And this rule applies even where the corporation is organized under a law alleged to be unconstitutional. *Friedland v. Pennsylvania Central Ins. Co.* 94 Pa. St. 504; *McCarthy v. Lavasche*, 89 Ill. 270; *Dows v. Naper*, 91 id. 44; Morawetz on Corporations, secs. 759, 760.

It is also contended that the loans of money for which said notes and deeds of trust were given are usurious. It is claimed that the rate of interest reserved was in excess of that allowed by the general interest laws of the State, and that the tenth section of the act of 1872 is in conflict with the provisions of section 22, article 4, of the Constitution which prohibits the General Assembly from passing any local or special laws regulating the rate of interest on money. The questions here raised were fully considered by this court in *Holmes v. Smythe*, 100 Ill. 413, and it was there held that the said section of the act of 1872 was not within the prohibition of the Constitution, and that the transaction under consideration in that case, which in all its material aspects was precisely similar to those now before us, was not usurious. As we held in *Freeman v. Ottawa Building, Homestead and Savings Association*, 114 Ill. 182, these questions are no longer open to discussion.

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Opinion of the Court.

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The principal controversy arises upon the charges of fraud and misrepresentation whereby, as it is claimed, Winget was induced to become a member of said association and to apply to it for said loan of money, and whereby Winget and wife were induced to execute to the association their notes and deeds of trust as security for said loans. The evidence bearing upon these charges is quite voluminous and to a considerable degree conflicting, but after having given it patient consideration, we are disposed to concur with the decision of the Appellate Court that said charges are not sustained.

The form of organization of the association, and the general scheme upon which its business is conducted, are, so far as we are able to perceive, in strict accordance with the provisions of the act of 1872, and they must therefore be held to be fully authorized by law. Thus, the rules that no loans should be made except to members; that loans should be put up at auction and struck off to the members who should bid the highest premium; that every share of stock should be subject to a lien for the payment of unpaid installments and other charges incurred thereon under the provisions of the charter and by-laws, and that no stockholder should withdraw from the association whose stock was held in pledge for security, are all based directly upon the act. The by-law providing that when the shares of stock of any series upon which a loan should be granted should reach the matured value of \$100 each, the value of the stock should be credited to the account of the borrowing member, thus satisfying and discharging the loan, and that the stock so credited should thereupon be cancelled and revert to the association, furnished a mode of satisfying loans and adjusting the accounts between the association and its borrowing members which was entirely consistent with and warranted by the provisions of the act.

Most if not all the representations complained of were made with reference to and in laudation of the financial scheme authorized by said act and adopted and put in practice by the

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Opinion of the Court.

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association. The evidence in relation to the representations alleged to have been made orally is conflicting, and we are of the opinion that the master was correct in pronouncing it unsatisfactory, and in declining to find that any of the representations imputed to the officers and agents of the association were in fact made, except so far as they corresponded in substance with those contained in the printed circulars issued by the association. It remains to be seen whether said circulars contained misrepresentations of such character as should call for a rescission of the contractual relations between the parties.

There can be no doubt that the association, by said circulars, presented the advantages to laboring men and others having small incomes, of its financial scheme, in a somewhat roseate light, and that opinions were expressed which, when subjected to the test of experience, have proved to be fallacious. But we are unable to find in said circulars any statement or representation of any material fact which is shown by the evidence to be essentially untrue. Besides, Winget, at the time he became a member of the association, or before, was furnished with a printed copy of the charter and by-laws of the association, in which the rights and obligations of members, and the principles upon which loans of money were made and secured were fully stated. He had thus in his own hands the means of ascertaining and judging for himself as to the desirability of membership in the association, and as to the advisability of seeking to obtain from it loans of money. The first loan was obtained May 3, 1876, and after an interval of a little more than two years and a half, during which he must be deemed to have had sufficient opportunity to investigate the soundness and honesty of the financial methods adopted by the association, and the truthfulness of its representations, he applied for and obtained a further loan upon like terms and giving the same kind of security as before. It is difficult to see how, under these circumstances, even if the circulars should be found to contain statements of fact which were false and misleading, the com-

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Opinion of the Court.

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plainants could be permitted to rescind their contracts on the ground of fraud.

The alleged misrepresentations upon which chief reliance is placed are, that it would be better and cheaper for Winget to obtain a loan from the association than to borrow elsewhere, and, that all the profits of the association would be shared equally by all the members. The first of these representations would seem to be a matter of opinion rather than the statement of a fact; but waiving that consideration, its failure to prove true in the case of Winget's loans results from two causes, first, the large premiums bid by him for the loans, and second, the frequent fines incurred by him by reason of his failure to pay his installments at maturity. It is needless to say that the fines which he had to pay were the result of his own negligence, and should not enter into the computation in testing the truthfulness of the representation. The premiums bid and paid were very large, the first being thirty-eight and the second thirty-one per cent of the amount of the proposed loan, and such premiums being paid by him voluntarily and with his eyes open, their effect upon the general result was a matter for which he was responsible equally with the association. If it be said that, under the circumstances, the loans could be obtained only by paying the premiums bid, it need only be replied that he was under no coercion, and was not compelled to take the loans if the rates of premium were bid up to a figure which would make them too expensive.

It is demonstrable that if Winget had incurred no fines and had paid no premiums or but small ones, the loans would have been more advantageous than if made at the then usual rate of interest. Thus, if no premium had been paid and the stock had become par in eight or nine years, which the evidence shows was the usual period, the loans would have been almost or quite without interest. The payments in eight years would aggregate only ninety-six and in nine years only one hundred and eight per cent of the face of the loans, and as the

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Syllabus.

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stock would then equal in value the principal of the loan, the indebtedness would be cancelled by a credit of the par value of the stock and no further payments would be required. That this result was impossible in Winget's case was due solely to the large premiums bid and the numerous fines incurred.

We are unable to see that the representation that the profits of the association would be shared equally by all the members was in any degree untruthful. All the profits arising out of the funds belonging to a particular series of stock were accumulated and held until that series of stock became par, and then all members holding stock in that series were alike entitled to a credit to the amount of the par value of their stock. If the stockholder was not also a borrower, the par value of his stock was paid to him in cash. If he was a borrower the same amount was applied to the cancellation of his loan.

After fully considering the case, we are satisfied with the conclusion reached by the Appellate Court, and the judgment of that court will therefore be affirmed.

*Judgment affirmed.*

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GUSTAVUS C. PEARSON

*v.*

JAMES SANDERSON.

*Filed at Springfield April 5, 1889.*

1. ARBITRATION AND AWARD—*whether so considered—action of appraisers of improvements, under a lease—notice to the parties.* Where a lease for a term of years provides that at the end of the term each party shall select an appraiser to value the permanent improvements put upon the premises, and in case they can not agree, the appraisers thus chosen shall select a third, and that the lessor shall pay the lessee the amount of such appraisal by any two of the appraisers, the action of the appraisers under such appointment is not an arbitration and award, so as to require notice to the parties of the time and place of the appraisers' meeting and action. In such case no statement of the parties or evi-

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Brief for the Plaintiff in Error.

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dence is contemplated. The appraisers are required to examine the improvements, and act on their own judgment.

2. **LANDLORD AND TENANT—purchase of improvements by a lessor—upon appraised value, under the lease.** A lease of property for a term of years provided that on the expiration of the term without a purchase by the lessor of improvements which might be put upon the premises by the lessee, one appraiser should be chosen by each of the parties thereto, who should appraise the then cash value of the permanent improvements made by the lessee and remaining upon the leased premises, and that in the event of the two appraisers failing to agree upon values they should select a third person, and that the valuation fixed by any two of the three appraisers should determine the amount to be paid the lessee by the lessor, after giving the latter credit and paying all liens due him from the lessee for money advanced, unpaid rent and other indebtedness due or to become due from the lessee to the lessor. The parties each selected an appraiser, who, being unable to agree, selected a third one. Two of the three made an appraisement: *Held*, in an action by the lessee against the lessor, to recover the appraised value, that the court properly instructed the jury that the defendant was liable for such valuation of all the permanent improvements put on the premises and remaining thereon at the end of the term.

3. **INTEREST—whether allowable—sum fixed by appraisers under terms of a lease.** In such case, the sum found by the appraisers for the value of the improvements was a debt evidenced by the terms of the lease, and, as such, would draw six per cent interest from the date of the appraisement.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Vermilion county; the Hon. C. B. SMITH, Judge, presiding.

Mr. J. B. MANN, for the plaintiff in error:

The so-called appraisers were, in fact, arbitrators, and their action should have been governed by the rules affecting arbitrators. If they were such, the court will so treat them, and define their duties accordingly. *Van Courtland v. Underhill*, 17 Johns. 405; *Layman v. Young*, 31 Pa. St. 306.

This court has decided that where there is nothing for appraisers to do but to fix the price to be paid for a definitely determined article, they are not arbitrators, in the legal sense. (*Norton v. Gale*, 95 Ill. 533; *Stose v. Heissler*, 120 id. 435.)

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Brief for the Defendant in Error.

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But the appraisers in the case at bar had necessarily to decide many more questions than the mere value of property. Before any award could possibly be made by them, it was imperatively necessary that they should agree upon the following matters: First, what improvements were made on the leased premises by appellee; second, were such improvements permanent; third, were such improvements authorized by the terms of the lease; fourth, what was the fair cash value of such improvements, and, as an incident thereto, what value did they add to the premises.

The rule requiring notice of the hearing is without exception, and if there has been no such notice there can not be a legal hearing or a valid award. Morse on Arb. and Award, 118.

The trial court erred in instructing the jury that the plaintiff in error was liable for all the improvements placed upon the premises by the defendant in error. The value of no improvements whatever, except the mill building and dwelling house, could be properly recovered.

The court also erred in instructing the jury that the defendant in error was entitled to interest on the award. There is no evidence as to any date when plaintiff in error was notified of the award. There is no proof that a copy was given him. Defendant in error says he told plaintiff in error, after the appraisement was made, that he, defendant in error, had done all he could, and the appraisers had done all they could, and he left them to complete it. This is all the proof of a demand there is in this entire record. The jury allowed interest from the date of the award.

Mr. F. BOOKWALTER, for the defendant in error:

An arbitration is defined to be the investigation and determination of matter or matters of difference between contending parties, by one or more unofficial persons chosen by the parties, and called arbitrators. 3 Blackstone's Com. (Sharswood's ed.) 16; *Norton v. Gale*, 95 Ill. 533.

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Opinion of the Court.

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That the matter in question was not on arbitration, and not to be governed by the rules regulating arbitrators, has been conclusively settled in this State by a long line of decisions. *Illinois and Michigan Canal v. Lynch*, 5 Gilm. 521; *McAvoy v. Long*, 13 Ill. 147; *Railroad Co. v. Spurck*, 24 id. 587; *Snell v. Brown*, 71 id. 133; *Korf v. Lull*, 70 id. 420; *Norton v. Gale*, 95 id. 535.

The finding of the appraisers can only be attacked for fraud or mistake. *McAuley v. Carter*, 22 Ill. 53; *Downey v. O'Donnell*, 92 id. 559.

No notice is necessary to the parties, because they are bound to take notice of the acts of the appraisers. *McAuley v. Carter*, 22 Ill. 53; *Norton v. Gale*, 95 id. 533.

The finding of the appraisers draws interest at the rate of six per cent per annum, from the time of their finding. See *Downey v. O'Donnell*, 92 Ill. 559.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court: This was an action brought by James Sanderson, against Gustavus C. Pearson, to recover the amount of an appraisement which had been awarded the plaintiff for permanent improvements placed by him on certain premises leased of the defendant.

Under the contract set out in the declaration, certain premises in Danville, Illinois, were leased by Pearson to Sanderson for five years, from April 1, 1881, upon which the latter was authorized to erect a corn and feed mill and dwelling house. The lease, among others, contained the following provision: "At the expiration of five years, in case of non-renewal of this or the making of a new lease, or at the period that this lease shall be determined by forfeiture, by agreement, or in case of death of lessee, in case said lessor has not already purchased said improvements, one appraiser, who shall be a householder and citizen of Danville, shall be chosen by each, (lessor and lessee,) which appraisers shall determine the then cash value

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Opinion of the Court.

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of the permanent improvements made by said lessee, and remaining upon the said premises leased, provided the lessee may first remove the engine, boiler machinery, if free from liens in favor of lessor. In the event of the appraisers failing to agree upon values, a third person shall be chosen by them, (the appraisers,) who shall be a resident and householder of Danville. The valuation decided upon by two of the three appraisers shall determine the amount that shall be paid by lessor to lessee for said improvements, after giving lessor credit, and paying all liens due him from lessee for money advanced, unpaid rent, or other indebtedness due or to become due from lessee to lessor."

It is also averred in the declaration, that plaintiff entered into possession of said premises and occupied the same under said agreement, for five years, and made the following permanent improvements, viz.: One house and kitchen, one mill building, one barn and shed, one well and cistern at the house, filling yard, one out-house, partition fence and shrubbery; and that said lease was not renewed, and that defendant did not purchase the permanent improvements made upon said premises; that on April 2, 1886, plaintiff chose Henry Brand as his appraiser, and defendant chose John Beard, and that they failed to agree, and that on July 1, 1886, they chose Magnus Yeager, and that the three could not agree, but that Yeager and Brand did, on July 7, 1886, appraise, determine and fix the fair cash value of said permanent improvements so left on said premises, at their value on April 1, 1886, and made a written finding, in which plaintiff was allowed \$1640 therefor.

To the declaration the defendant pleaded the general issue and several special pleas. The defense set up and relied upon in the special pleas, in substance, was, that the appraisers were arbitrators, and as the rules governing arbitrators were not observed, especially in giving notice of the time and place of meeting, the action of the appraisers was not binding on the defendant.

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Opinion of the Court.

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If the proceeding which resulted in an appraisement in favor of the plaintiff for the sum of \$1640 was an award, and should be governed and controlled by the rules that govern arbitrations and awards, the validity of the appraisement might well be doubted. But the proceeding, as we understand it, was not an arbitration. It was a mere appraisement of the value of certain permanent improvements placed upon the premises by the plaintiff, which appraisement, under the terms of the lease, was to be paid by the defendant. *Norton v. Gale*, 95 Ill. 533, is an authority in point. It was there held, that where the parties to a lease provide for rent to be paid yearly, at six per cent on the appraised value of the demised premises, to be ascertained by the selection of property holders, this is not a submission to arbitration, and no notice to the parties is necessary before making the appraisement, unless the lease so requires; and the finding of the appraisers, when selected, will be conclusive upon the parties, except for fraud. The decision in the case cited was approved, where a similar question arose, in *Stose v. Heissler*, 120 Ill. 436. No distinction can be drawn between the cases cited and the one under consideration. In the *Norton case*, the appraisers were selected to appraise the value of leased premises, the value, when fixed, to form the basis for the payment of rent at a specified per cent, while here the appraisers are selected to determine the value of certain permanent improvements placed on the leased premises. In neither case was it contemplated that evidence or the statement of the parties should be heard, but the appraisers were merely to examine the property, and use their own judgment in determining value. There was no dispute to be settled or trial to be had, as is the case where there is an arbitration and award. Where a proceeding is an arbitration, it is necessary that a time and place should be fixed for a hearing,—that the parties should receive notice, in order that they might appear and introduce their evidence, and make their statements before the arbitrators. But nothing of the

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Opinion of the Court.

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kind is required in a case of this character. No evidence is to be heard. The appraisers ascertain such facts as may have a bearing on the value of the improvements, in their own way, and act upon their own judgment.

It is also claimed that the court erred in instructing the jury that the defendant was liable for all the improvements placed upon the premises. The contract provided that the appraisers shall determine the cash value of the permanent improvements made by the lessee and remaining upon the premises leased, and the construction placed upon the contract by the court was, that the defendant was liable for the permanent improvements. We think the construction placed upon the lease was warranted by its terms. The court instructed the jury that plaintiff was entitled to recover the amount fixed upon by the appraisers, with six per cent interest from the time defendant was notified of the amount which had been agreed upon, and it is insisted that interest could not be recovered.

Section 2, chapter 74, of the statute, provides that interest may be recovered at the rate of six per cent upon all moneys after they become due, on any bond, bill, promissory note or other instrument of writing. The lease executed by the parties, as has been seen, provided that the valuation decided upon by the appraisers should determine the amount that should be paid by lessor to lessee for said improvements. Under this clause of the lease, when the appraisers fixed upon the amount which the lessee was entitled to receive under its terms, then the amount became due by the terms of the lease. The lease was an instrument of writing, within the meaning of the statute, *supra*, and as interest may be recovered on money due on an instrument of writing, we are of opinion that interest was properly allowed.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE WILKIN took no part in this case.

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Syllabus.

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JAMES BOZARTH *et al.*

v.

WILLIAM LARGENT.

128	95
31a	575
128	95
137	63
137	74
128	95
142	393

*Filed at Springfield April 5, 1889.*

1. **ESTATE OF HUSBAND IN WIFE'S LAND**—at common law—of the estate during *coverture*—and *estate by the curtesy*—Married Woman's act of 1861. At the common law, a husband held, in right of his wife, all her lands in possession, and owned the rents and profits thereof absolutely. The birth of issue was not necessary to this right of the husband, which continued during the joint lives of the husband and wife. It was called an *estate during coverture*, or the husband's freehold estate *jure uxoris*.

2. This estate of the husband in his wife's lands differed from *curtesy* in its being a vested estate in possession, while the latter is a contingent future estate, dependent upon the birth of issue. It was held in right of the wife, and was not added to or diminished when *curtesy* initiate arose. Subject to the husband's beneficial enjoyment during *coverture*, the ownership remained in the wife, and on dissolution of the marriage the property was discharged from such estate of the husband.

3. Where there was marriage, seizin of the wife and birth of issue capable of inheriting, the husband, by the common law, took an estate in the wife's lands during *coverture*. This was an estate of tenancy by the *curtesy* initiate, which would become consummate upon the death of the wife in the lifetime of the tenant. Upon the death of the wife, a tenant by the *curtesy* was seized of an estate of freehold, which was subject to alienation, and was liable to be taken on execution for his debts.

4. The effect of the Married Woman's act of 1861 was to abrogate the husband's estate in his wife's lands, or the estate he would have had at common law during the *coverture*, when the marriage took place after that act took effect, and, consequently, during the *coverture* he would have no estate therein liable to execution or attachment. This act did away with the estate he would have had, at common law, growing out of the marital relation.

5. The general effect of statutes of this kind is to destroy the marital rights of the husband in his wife's estate, but a statute may exempt her property from his debts without in any way destroying his rights therein. Unless tenancy by the *curtesy* is destroyed by the statute by express words or necessary implication, or by the wife's disposition of her property by virtue of her power over it, the husband will be held to have an *estate by the curtesy* at her death.

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Syllabus.

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6. The purpose and effect of the Married Woman's act of 1861 were to secure to the wife the control of her separate property during coverture, during which time the husband's common law rights in her property are suspended. It did not destroy the estate of curtesy, but after the passage of that act, and prior to the passage of the act of 1874, the husband, on his wife's death, leaving issue of the marriage, took a life estate in her land as tenant by the curtesy.

7. Where a marriage took place in 1863, the wife having lands inherited from her father, and she died in 1868, leaving issue of the marriage, it was held, that on her death the husband took a life estate in her land, which was subject to sale on execution against him.

8. REDEMPTION *by judgment creditor—validity of original sale essential—and herein, of the effect of mere errors or irregularities.* If a foreclosure sale of land is void for any cause, a judgment creditor redeeming therefrom will acquire no title under his purchase, for the reason that his rights, like those of the first purchaser, are dependent upon a valid judgment or decree and sale.

9. But where the trial court had jurisdiction of the subject matter and of the parties, mere errors and irregularities can not be taken advantage of to defeat a sale made under a decree in the cause, or to defeat a sale made on a redemption by a judgment creditor.

10. SAME—*sale of lands en masse—as affecting the right of redemption—and the mode.* Although distinct tracts of land be sold *en masse* on decree of foreclosure, this will not render the sale void. At most it will be a ground for setting the sale aside, on proper application made in apt time. It can not be urged to defeat the sale in an action of ejectment.

11. But where several tracts of land are sold *en masse* on a decree of foreclosure, neither the original owner nor his judgment creditor can redeem a part of the lands so sold, but must redeem the whole. If the tracts are sold separately, either one may redeem any tract so sold. The judgment creditor's right to redeem is no greater or more extensive than that of his debtor.

12. SAME—*who may question the regularity of a redemption by judgment creditor.* After the expiration of twelve months from the sale, the right of the judgment debtor is gone, and he no longer has any interest in the premises, and can not take advantage of irregularities in making redemption by his judgment creditor, and his acquisition of title by virtue of a sale under such redemption. If the purchaser at the first sale makes no objection to the validity of the redemption, and receives the redemption money, the redemption will be complete, and the original debtor can not object that the sale on redemption was *en masse*, even if it could have been made in any other way.

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Syllabus.

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13. Where the estate of a life tenant by the courtesy is sold on a decree of foreclosure against him, his heirs (the remainder-men) can not object to a sale on redemption because the redemption was made in the name of a judgment creditor of the life tenant after he has assigned his judgment, instead of being made in the name of the assignee.

14. *SAME—time of making the deed—in case of purchase by redeeming creditor—the statute construed.* On a redemption by a judgment creditor, the statute provides that the redeeming creditor shall be deemed as having bid at the sale the amount of the redemption money paid by him, with interest thereon, and costs, and that if no greater amount is bid the premises shall be struck off to such judgment creditor, and the officer shall "forthwith" execute a deed of the premises to him: *Held*, that the word "forthwith" is not mandatory, but directory, only, and that a deed made thereafter, even after the sheriff who made the sale goes out of office, is good and valid to pass the title.

15. *INURING OF TITLE—to a mortgagee—of an estate by the courtesy.* A husband and wife in 1868 executed their mortgage on the lands of the latter, the former having no present estate in the premises. The mortgage contained covenants of good right to convey, seizin in fee, and of general warranty. The wife shortly afterward died, leaving issue of the marriage, so that the husband succeeded to an estate as tenant by the courtesy for life: *Held*, that under the covenants in the mortgage his life estate inured to the benefit of the mortgagee, and passed under a sale under a decree of foreclosure of the mortgage.

16. *APPEAL—what questions involved—claim of homestead, in respect to which there was no evidence.* In an action of ejectment to recover land sold under a decree of foreclosure, no proof was offered at the trial tending to show that the premises when sold, or when the mortgage was given, were occupied by the mortgagors, or either of them, as a homestead, nor was it shown they were so occupied at any time: *Held*, on error, that the question of a homestead right, to defeat the sale, was not presented for adjudication, and could not be considered.

17. *SERVICE OF PROCESS—in chancery—sufficiency of return.* Summons in a suit to foreclose a mortgage was properly issued, and made returnable to the next term. The return of service was: "Executed this writ by reading the same to the within A, B, C and D, and by delivering to each a true copy hereof, this 10th day of April, 1872," and it was properly signed by the sheriff, and the service was in apt time: *Held*, that the return showed a good service, and that the fact of the reading of the summons did no harm, and might be disregarded.

WRIT OF ERROR to the Circuit Court of Tazewell county; the Hon. N. W. GREEN, Judge, presiding.

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Statement of the case.

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This was an action of ejectment, brought by James Bozarth, Mary L. Bozarth and Ida B. Cook, the heirs-at-law of Louisa Bozarth, deceased, against William Largent, for the recovery in fee of the east half of the south-west quarter of section 17, and the west half of the south-west quarter of the south-west quarter of section 8, all in town 23 north, range 2, west of the third principal meridian, in Tazewell county. General issue was filed, and a trial had, resulting in a finding and judgment for defendant. Plaintiffs below prosecute this writ of error.

The facts are as follows: Louisa Bozarth, now deceased, being the owner in fee of said lands, which she had inherited from her father, was on August 19, 1863, married to Asa Bozarth. They lived together as husband and wife until November 1, 1868, when she died intestate, leaving her husband, who is still living, and the plaintiffs, her children and only heirs-at-law, surviving her. On March 5, 1868, she and her husband executed their mortgage upon the lands in controversy, and other lands of her husband, to Anna R. Cohrs, to secure the payment of \$2500, evidenced by the note of Asa Bozarth, the husband, payable two years after date, with ten per cent interest, payable annually, and containing a clause that in default of the payment of the annual interest, the principal should become due. The mortgage was in the usual form, and contained a release of all homestead rights, and the wife acknowledged the release of all her rights of homestead, but the husband did not acknowledge the release of homestead, his acknowledgment being simply that he acknowledged the mortgage to be his free act and deed, for the uses and purposes therein set forth.

On March 27, 1873, Mary C. Maus, the assignee of said note and mortgage, filed her bill in the circuit court of Tazewell county, against the said Asa Bozarth and the plaintiffs, and others, for the foreclosure of said mortgage. Summons was duly served on all the defendants, and a guardian *ad litem*

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Statement of the case.

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was appointed for James, Ida B. and Mary Bozarth, (the plaintiffs,) they being then minors, who answered. At the May term, 1873, a decree was entered foreclosing said mortgage, and finding due thereon the sum of \$2973.75, and a solicitor's fee of \$125 provided for in the mortgage, and ordering a sale of the premises, etc. Sale was made under said decree July 12, 1873, to William Don Maus, for the sum of \$3048.84. The sale was made *en masse*, the master having failed to obtain bids on the several tracts when separately offered. Certificate of purchase was made and recorded the same day.

At the May term, 1874, of the McLean circuit court, Albert Welch recovered a judgment against the said Asa Bozarth, John Bozarth and Elihu Bozarth, for \$1250.50 and costs. Execution was issued to the sheriff of McLean county, and returned August 19, 1874, when Welch assigned the judgment to George W. Thompson. On the same day, an *alias* execution issued to the sheriff of Tazewell county, which came to that officer's hands August 20, 1874, and was levied on all the land sold under the foreclosure decree, and a certificate of levy was filed and recorded August 31, 1874. On October 10, 1874, a certificate of redemption from the sale under the decree of July 12, 1873, was executed by the sheriff of Tazewell county, and recorded on the same day. On October 31, 1874, the land was sold *en masse* by the sheriff to Welch for redemption money and costs. On January 14, 1875, after the term of office of the sheriff had expired, he made and delivered to Welch a deed for the premises, dating the same as of the day of sale. On the same day, Pratt, the then sheriff, also executed a deed to Welch for the lands on the same sale. Welch and wife, by their deed of December 1, 1875, conveyed the land to John Bozarth, and he, on May 22, 1882, conveyed the same to William Largent, defendant in error, who went into possession of the same.

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Brief for the Plaintiffs in Error.

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Mr. B. S. PRETTYMAN, for the plaintiffs in error:

Since the Married Woman's act of 1861, as respects the wife's separate estate, the husband stands before the law as a stranger. *Patten v. Patten*, 75 Ill. 451; *Tomlinson v. Matthews*, 98 id. 178.

The act of 1861 expressly provides that her property "shall be exempt from execution or attachment for the debts of her husband," not during coverture only, but without limit of time, or provision of exception in case of her death, or of her conveying it by mortgage with his concurrence, or of the vesting of the fee in her children through her death. It was to be exempt from execution or debts of the husband, as and for a like purpose as a homestead is exempt, against which courtesy can not prevail. *Loeb v. McMahon*, 89 Ill. 490.

A father devising property to his married daughter, and desiring that no part of it should be liable to the payment of the debts of the husband, such husband is excluded from any estate by courtesy therein; and property so devised is not liable for his debts on execution, even if the estate by courtesy had not been abolished. *Monroe v. Van Meter*, 100 Ill. 348.

But if the estate by courtesy does exist, in law, since 1861, in cases arising under that act, it is clearly so modified as to strip the husband of the use and control, during the marriage, of all of the wife's separate property, and make it exempt from seizure and sale under execution against him, or for his debts, not only during coverture, but after her death. The purpose of the law was to protect any honest provision, in real or personal property, which friends or relatives, from their means, might make for or give to the wife, to prevent her suffering for or to supply her with the necessities of life, or to aid her in supporting and educating her children. For this purpose the law has made her separate property exempt from sale under execution for her husband's debts. For such purposes it is, and long has been, the policy of the law to exempt property from execution, as, of household goods to the head of the

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Brief for the Defendant in Error.

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family, liberal allowances to the widow, and by the provisions of the Homestead law. Thus restricted or "modified" by the act of 1861, the estate by courtesy, if not destroyed, had most, if not all, of its rights, powers and privileges then eliminated from it.

The wife and husband both waiving the homestead on the face of the mortgage, and the wife, but not the husband, waiving the homestead in the acknowledgment, is not a good waiver as to either.

This mortgage, as to the plaintiffs and their right of homestead, is void, (*Richards v. Greene*, 73 Ill. 54, *Best v. Gholson*, 89 id. 465, *Asher v. Mitchell*, 92 id. 490,) and its reception as evidence, against complainant's objection, for incompetence, was erroneous. Rev. Stat. 1874, chap. 41, secs. 1, 5.

Any person may redeem lands sold by a master or sheriff, and if the purchaser accepts the redemption money, the sale and certificate of purchase are rendered thenceforth void; and when land sold belonged in fee to a deceased person, by the redémption it is then and thereby vested in fee in the heirs of such person, at law. (*Turney v. Young*, 22 Ill. 255.) And if the levy and sale in this case, relied on by defendant, were designed to be made on an estate by courtesy in the land in question, as belonging to Asa Bozarth, it was then without such title in him, and was contrary to law as to any dower interest, because dower can not be levied on and sold legally until it is assigned. *Blain v. Harrison*, 11 Ill. 384.

After the assignment of the judgment the right to redeem was in the assignee.

Mr. WILLIAM DON MAUS, and Mr. T. N. GREEN, for the defendants in error:

The Married Woman's act of 1861 did not, by express terms or by implication, abrogate the estate of tenancy by the courtesy. *Cole v. Van Riper*, 44 Ill. 65; *Clark v. Thompson*, 47 id. 26; *Beach v. Miller*, 51 id. 209; *Noble v. McFarland*, 51 id.

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Opinion of the Court.

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226; *Armstrong v. Wilson*, 60 id. 226; *Monroe v. Van Meter*, 100 id. 348; *Lucas v. Lucas*, 103 id. 121. And the contrary view is not sustained by plaintiff's citation of *Rose v. Sanderson*, 38 Ill. 248, *Farrell v. Patterson*, 43 id. 57, *Tomlinson v. Matthews*, 98 id. 178, *Patten v. Patten*, 75 id. 447, and *Loeb v. McMahon*, 89 id. 489.

The estate by the courtesy vested in real estate acquired by the wife, after the act of 1861 became a law, at the death of the wife. *Monroe v. Van Meter*, 100 Ill. 348.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

At the common law, a husband held, in right of his wife, all her lands in possession, and owned the rents and profits thereof absolutely. (1 Washburn on Real Prop. 276; Tiedeman on Real Prop. sec. 90; *Haralson v. Bridges*, 14 Ill. 37; *Clapp v. Inhabitants of Stoughton*, 10 Pick. 463; *Decker v. Livingston*, 15 Johns. 479.) The birth of issue was not necessary to this right of the husband, which continued during the joint lives of the husband and wife. It was called an estate during coverture, or the husband's freehold estate *jure uxoris*. (*Kibbie v. Williams*, 58 Ill. 30; *Butterfield v. Beall*, 3 Ind. 203; *Montgomery v. Tate*, 12 id. 615; *Croft v. Wilbar*, 7 Allen, 248.) It differed from courtesy initiate, in its being a vested estate in possession, while the latter is a contingent future estate, dependent upon the birth of issue. (*Wright's case*, 2 Md. 429.) It is held in right of the wife, and was not added to or diminished when courtesy initiate arose. Subject to the husband's beneficial enjoyment during coverture, the ownership remained in the wife, and on dissolution of the marriage was discharged from such estate of the husband. (Stewart on Husband and Wife, sec. 146.) Where there was marriage, seizin of the wife and birth of issue capable of inheriting, the husband, by the common law, took an estate in the wife's land during coverture. This was an estate of tenancy by the courtesy initiate,

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Opinion of the Court.

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and which would become consummate upon the death of the wife in the lifetime of the tenant. Upon the death of the wife, a tenant by the courtesy was seized of an estate of freehold, which was subject to alienation, and was liable to be taken on execution for his debts. Tiedeman on Real Prop. sec. 101; *Howey v. Goings*, 13 Ill. 95; *Jacobs v. Rice*, 33 id. 369; *Cole v. Van Riper*, 44 id. 58; *Beach v. Miller*, 51 id. 206; *Lang v. Hitchcock*, 99 id. 550.

The act of 1861, known as the Married Woman's act, provides: "That all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

In this case, Louisa Bozarth, who was the common source of title, was the owner of the land in controversy, as it is conceded, at the time of her marriage, August 19, 1863, to Asa Bozarth. The marriage having taken place after the act of 1861 took effect, and the wife being then the owner of the land in question, it was not, during her coverture, subject to the control, interference or disposal of her husband, or liable for his debts or other obligations. The effect of the statute was to abrogate the husband's estate in her lands, or the estate he would have had at common law during the coverture, and, consequently, during that period he had no estate therein liable to execution or attachment. The act did away with the estate he would have had at common law, growing out of the

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Opinion of the Court.

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marital relation, and it therefore follows, if the wife had been living at the time of the redemption and sale by the creditor of her husband, that proceeding would not have divested any right of herself or husband, or conferred any right upon the purchaser.

The question, however, remains, whether Asa Bozarth, the husband, on the death of his wife, in 1868, acquired an estate in her land as tenant by the curtesy. We have already seen that the property of a married woman, under the act of 1861, notwithstanding her marriage, was to be and remain, during coverture, her sole and separate property, and was not subject to the husband's control or liable for his debts. The general effect of statutes of this kind is to destroy the marital rights of the husband in his wife's estate; but a statute may exempt her property from his debts without in any way destroying his rights therein. Unless tenancy by the curtesy is destroyed by the statute by express words or necessary implication, or by the wife's disposition of her property, by virtue of her power over it, he will be held to have an estate by the curtesy at her death. The prevailing opinion seems to be, that while separate property acts do suspend, during coverture, all the rights of a husband, or his creditors, in statutory separate property, they do not destroy curtesy, or prevent its vesting on her death, unless such an event is clearly excluded by the statute,—as, where the statute not only provides that the property of the wife shall be hers, etc., but also defines her husband's interest therein, if she dies intestate, in which case curtesy is excluded. Where she has power to alienate or charge her property, she may thereby defeat curtesy, but the statute must contain express words to enable her to convey alone; and, also, when she has power of disposition of the property by will, she may thereby defeat curtesy. Stewart on Husband and Wife, secs. 243-161; *In the matter of Winne*, 2 Lans. (N. Y.) 21; *Hatfield v. Sneden*, 54 N. Y. 380; *Noble v. McFarland*, 51 Ill. 226; *Freeman v. Hartman*, 45 id. 57; *Cole v. Van Riper*, *supra*.

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Opinion of the Court.

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It will be seen that the Married Woman's act of 1861 does not attempt to define the husband's rights in his wife's property after her decease, nor does it give her any power of disposal of her separate property, independent of the husband. The purpose and effect of the statute were to secure to the wife the control of her separate property during coverture. During that period the husband's common law rights in her property are suspended. We are of opinion that this act did not have the effect of destroying the estate of curtesy, but that after the passage of that act, and prior to the passage of the act of 1874, the husband, on his wife's death, leaving issue of the marriage, took a life estate in her land as tenant by the curtesy. After the passage of the act under consideration, the estate by the curtesy in the lands of the wife did not vest in the husband until the death of the wife, (*Lucas v. Lucas*, 103 Ill. 121, *Beach v. Miller*, 51 id. 206,) but upon her death such estate became consummate, and vested in the husband in all respects as at common law. (*Noble v. McFarland*, 51 Ill. 226; *Shortall v. Hinckley*, 41 id. 219; *Gay v. Gay*, 123 id. 221; *Castner v. Walrod*, 83 id. 171.) It follows, that we are of opinion that upon the death of the wife in 1868, leaving issue surviving, the husband, Asa Bozarth, became seized of a freehold interest in the lands in controversy, as tenant by the curtesy, and which was subject to seizure and sale on execution against him.

The validity of the sale of the premises under the decree of foreclosure, and the redemption upon the execution issued upon the judgment in favor of Welch, and against the said Asa Bozarth, and the sale thereunder, is questioned by the plaintiffs in error. If the foreclosure sale was void for any cause, the judgment creditor redeeming therefrom acquired no title under his purchase, for the reason that his rights, like the purchaser at the sale under the decree of foreclosure, are dependent upon a valid judgment or decree, and sale. *Johnson v. Baker*, 38 Ill. 99; *Mulvey v. Carpenter*, 78 id. 580; *Keeling v. Head*, 3 Head. 592.

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Opinion of the Court.

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It is objected that there was no sufficient service of summons upon the plaintiffs in error, who were defendants in the foreclosure suit. The return to the summons therein is as follows: "Executed this writ by reading the same to the within named Asa Bozarth, James Bozarth, Ida Bell Bozarth and Mary Bozarth, and by delivering to each a true copy hereof on the 10th day of April, 1873," and properly signed by the sheriff. The process was returnable to the May term, 1873. The service was in apt time. The fact that the summons was read to the defendants did no harm, and that part of the return may be disregarded. It is apparent that the circuit court had, therefore, jurisdiction of the subject matter and of the parties, and mere errors or irregularities, if any, can not be taken advantage of in this collateral proceeding.

It is objected that the mortgaged premises were improperly sold *en masse*. If this be conceded, it would not render the sale void. At most, it would only be grounds for setting the sale aside, on proper application to the court in apt time. It, however, appears that the land was offered by the master in separate parcels, and receiving no bids therefor, it was then offered and sold *en masse*. We are not prepared to say that the action of the master was not warranted.

It is next objected that all the lands sold under the decree were redeemed *en masse*, and so sold to Welch under the execution. A judgment creditor's right of redemption is no greater or more extensive than that of the original debtor. He can not redeem in a case where the original owner can not redeem within the time allowed by law for redemption by the debtor. In *Haukins v. Vineyard*, 14 Ill. 26, a quarter section of land had been sold, of which the debtor owned only sixty-five acres, and it was held that he could not redeem the sixty-five acres, but that he must redeem the whole or none. A person can not redeem an undivided share of land by paying his proportional share of the debt, and a part owner must redeem the whole. (*Durley v. Davis*, 69 Ill. 133.) A purchaser of a part of mort-

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Opinion of the Court.

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gaged land can not redeem that part by paying his proportion of the debt. (*Meacham v. Steele*, 93 Ill. 135.) When the purchaser at a master's sale of an entire tract of land afterwards assigns an undivided interest in such purchase, there can be no legal redemption of such undivided interest by a judgment creditor. *Groves v. Maghee*, 72 Ill. 526; *Titsworth v. Stout*, 49 id. 78.

Section 25, chapter 77, of the Revised Statutes, provides: "Any person entitled to redeem, may redeem the whole or any part of the premises sold, in like distinct parcels or quantities in which the same was sold," etc. If the several mortgaged tracts had been sold separately, redemption might have been made of any one or more of the tracts. In such case the amount that each tract sold for would furnish the basis for determining the amount to be paid in order to redeem; but as the several parcels of land were sold together, and for a gross sum, neither the debtor nor his judgment creditor could redeem without paying the full amount for which the same sold, with interest. The law gives the debtor twelve months in which to redeem, after which time any judgment creditor of the debtor may also redeem within fifteen months from the date of the sale; but in so doing, the creditor will possess no greater right than his debtor had within the time limited for redemption by him. After the expiration of twelve months from the sale, the right of redemption of the judgment debtor is gone. He no longer has any interest in the premises, and can not take advantage of mere irregularities in making redemption by his judgment creditor, and his acquisition of title by virtue of a sale in pursuance of such redemption. The purchaser at the foreclosure sale makes no objection to the validity of the redemption, and having accepted the money the redemption was complete. The title of Asa Bozarth being gone by his failure to redeem within the time allowed by law, he was not injured by a sale *en masse* on the execution, if, indeed, the sale could have been otherwise made.

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Opinion of the Court.

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There is no force in the objection that the redemption should have been made in the name of Thompson, assignee of Welch, the judgment creditor. (*Sweezy v. Chandler*, 11 Ill. 445.) It in no way concerns the plaintiffs in error whether redemption was made in the name of the plaintiff in the judgment against Asa Bozarth or in the name of his assignee.

No proof was made or offered at the trial tending to show that the premises, when sold under the decree of foreclosure, or when the mortgage was given, were occupied by the mortgagors, or either of them, as a homestead. Nor does it appear that they were at any time so occupied. Therefore, the question of the right of homestead was not presented for adjudication, and can not be considered in this court. It may, however, be observed, that the mortgage was executed and acknowledged before the act of 1872, relating to conveyances, took effect, and the cases cited by counsel were determined under the provisions of that act.

It is claimed that only the title of Louisa Bozarth passed by the sale under the decree of foreclosure, and therefore a creditor of her husband could not redeem from that sale. This contention is not well grounded. While the husband, as we have seen, at the time of the execution of the mortgage had no estate in the land, it was necessary to the execution of a valid mortgage, or conveyance of his wife's estate therein, that he should join in the mortgage or conveyance, which he did. The mortgage was in the usual form, and contained covenants of both the husband and wife, of good right to convey, seizin in fee, and of general warranty, and was sufficient to pass not only the estate of the wife, but also all the estate, right and interest of the husband in the property which he then had or might subsequently acquire. If he had no estate by the courtesy initiate, or otherwise, during the life of the wife, upon her death he took an estate for life in this land as tenant by the courtesy, which, under the covenants of the mortgage, inured to the benefit of the mortgagee. *Gochenour v. Mowry*, 33 Ill. 331.

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Opinion of the Court.

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The sheriff's deed was dated October 31, 1874,—the date of the sale upon the redemption,—but was in fact executed January 14, 1875, after the term of office of the sheriff had expired. Section 21 of the act relating to judgments, etc., provides, that the redeeming judgment creditor shall be considered as having bid at the sale the amount of the redemption money paid by him, with interest thereon, and the costs of the redemption and sale; "and if no greater amount is bid at such sale, the premises shall be struck off to such person making such redemption, and the officers shall forthwith execute a deed of the premises to him, and no other redemption shall be allowed." It is urged that the provision of the statute requiring the deed to be made "forthwith" is mandatory, and that a failure in this respect would render the sale void. We are not prepared to so hold. The purchaser is entitled to a deed forthwith in such case, but the failure of the sheriff to make the deed immediately after the sale will not render the redemption and sale invalid. This provision of the statute must be regarded as directory, only.

It is lastly objected, that Reeves, the sheriff, had no authority to make the deed after his term of office had expired. Section 30, of the act relating to judgments, etc., provides: "The deed shall be executed by the sheriff, master in chancery, or other officer who made such sale, or by his successor in office," etc. Freeman, in his work on Executions, (section 327,) says: "The officer who made the sale, whether he continues in office or not, is, in ordinary circumstances, and in the absence of statutory provisions to the contrary, the proper person to make a conveyance. \* \* \* When the term of the officer who made the sale terminates, his power to make the conveyance continues. In fact, unless the new sheriff is specially authorized by statute, he seems to have no authority whatever to make a conveyance based on a sale made by his predecessor." We are of opinion that the deed made by the retiring sheriff, under our statute, was valid. If this is so, it will be unneces-

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Syllabus.

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sary to determine whether the deed made by his successor in office is good or not. In any event, under the section of the statute quoted, by one deed or the other the title acquired under the redemption sale passed to the grantee in said deeds.

The plaintiffs claimed an estate in fee in the land in controversy, with a present right of possession. Their father having a life estate in the property, which has passed by virtue of the foreclosure sale, the redemption and sale thereunder, and the deeds in pursuance thereof to the defendant, they are not entitled to recover of the defendant the possession of said lands during the continuance of such estate. Until the termination of that life estate by the death of the life tenant, their right to a recovery must be postponed.

Some questions are raised as to the effect of the proceedings before mentioned, upon the fee to the land, which are not now before us for consideration, and no adjudication is made in respect thereof.

The judgment of the circuit court will be affirmed.

*Judgment affirmed.*

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RILEY KNOWLES

*v.*

HIRAM KNOWLES.

*Filed at Springfield April 5, 1889.*

1. PRACTICE—*trial by the court—propositions of law, and of fact.* Where the same proposition of law is substantially embraced in one “held” by the court as in one asked and refused, there will be no error in refusing to give the latter.

2. In a suit upon promissory notes, in which want of consideration and fraudulent misrepresentation, leading to their execution, are set up in defense, where the evidence is conflicting, a proposition submitted to the court trying the case without a jury, that the plaintiff is not entitled to recover, is a proposition of fact, and not of law, and therefore properly refused.

128	110
154	15
128	110
187	1503

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Opinion of the Court.

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APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Menard county; the Hon. CYRUS EPLER, Judge, presiding.

Mr. T. W. McNEELY, and Mr. N. W. BRANSON, for the appellant.

Mr. S. H. BLANE, for the appellee.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a suit in assumpsit, brought by Hiram Knowles against Riley Knowles, to recover the amount of two promissory notes executed by the defendant to the plaintiff. Under proper pleadings the defendant set up as a defense want of consideration and also certain false representations whereby he was induced to execute said notes, and a trial before the court, a jury being waived, resulted in a judgment in favor of the plaintiff for \$669.70 and costs. This judgment was affirmed by the Appellate Court on appeal, and the judges of that court having certified that the case involves questions of law of such importance, on account of collateral interests, that it should be passed upon by this court, the record has been brought here by a further appeal.

The plaintiff and defendant are brothers, and they with their brother Prettyman Knowles are the only surviving children of Marvel Knowles, a former resident of Gibson county, Indiana, and who died at that place testate July 31, 1883. In April, 1883, the defendant was indebted to his father in the sum of \$2716, evidenced by three promissory notes, two of which were secured by a mortgage on the defendant's land in Illinois. On the 24th day of that month the defendant's father surrendered and delivered said notes to the defendant, no part of them then being paid, and executed to him a release of said mortgage, and on the second day of May following, the defendant executed under his hand and seal, acknowledged and delivered

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Opinion of the Court.

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to his father an instrument in which, in consideration of the surrender to him of said notes and the execution of said release, he, for himself and his heirs, forever relinquished, surrendered and quit-claimed all his present and prospective interest, title or claim to any part or portion of the personal or real estate of his father.

The will of Marvel Knowles was executed September 9, 1881, which was prior to the execution by the defendant of said relinquishment of his interest in his father's estate. No change however was made in the will, and after the death of the testator it was duly probated in Gibson county, Indiana. The will, by its terms, after providing for the payment of the testator's debts and certain specific bequests, directed that the residue of his personal estate should be equally divided between his three sons; and also, after giving a certain tract of land to a grand-daughter, devised the residue of his real estate in equal shares to his three sons, the shares of Riley and Prettyman to go to them and their heirs and assigns forever, and the share of Hiram to go to him during his natural life, and at his death to his children.

The defendant testifies that, at the time of the execution of the instrument of May 2, 1883, he intended to relinquish his expectancy in his father's estate, but on examination of the will after his father's death, he came to the conclusion that he was placed on the same footing with his brothers, and he thereupon made claim to one-third of the estate. After some discussion, his brothers executed to him a deed conveying, as was supposed, the undivided one-third of all the lands belonging to his father's estate, said deed being executed, according to the recitals therein contained, in consideration of one dollar, "and to compromise and settle all differences and rights of action and supposed rights of action and matters in dispute between the parties hereto." The evidence as to the negotiations which led to the execution of this deed is very confused and uncertain, leaving it altogether in doubt as to what con-

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Opinion of the Court.

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troveries were in fact taken into consideration by the parties. It is not shown that the defendant at that time urged any claim beyond the right under the will to an undivided one-third interest in the lands. That he subsequently claimed the same interest in the personal estate may be fairly inferred from the evidence, although the amount of the personal estate, after the payment of debts and specific legacies, is not shown.

Some time after the execution of the deed last mentioned, it was discovered that it did not correctly describe the lands intended to be conveyed, a certain quarter section being therein described as only a forty acre tract, and negotiations were thereupon set on foot for the correction of the deed. The matter of such correction, as well as all other controversies with the defendant in relation to their father's estate was placed by the defendant's brothers in the hands of their attorneys in Indiana, and the defendant was referred by his brothers to them. The defendant thereupon called upon said attorneys and had an interview with them which lasted from four o'clock in the afternoon to three o'clock the next morning. In that interview said attorneys insisted that the defendant was still liable to the estate for the amount of the notes surrendered by his father, and that the same could be collected of him with interest, and that if he did not pay or account for the notes, he could not share in the distribution of his father's estate. The defendant, on the other hand, insisted that the notes were cancelled and that he was owing the estate nothing. As the result of the interview, said attorneys made a proposition which the defendant accepted, that to settle the entire controversy, the defendant should execute his promissory notes for two-thirds of the \$2700, one-half payable to each of his brothers, and thereupon the defendant executed his six promissory notes for \$300 each, three payable to his brother Hiram and three to his brother Prettyman. The notes in suit are two of the notes executed to Hiram. Soon afterward, and in pursuance of the arrangement then made, the defendant reconveyed to

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Opinion of the Court.

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his brothers the lands conveyed by the deed containing the erroneous description, and a new deed was executed to him by which his brothers conveyed to him an undivided one-third of said lands by a correct description. That deed contained the following clause: "And it is further agreed by the grantors herein, that they, as heirs of Marvel Knowles, do hereby release the grantee, the said Riley Knowles, from any and all obligations and releases which the said Riley Knowles incurred and referred to in a certain release executed by him to said Marvel Knowles on the 2d day of May, 1883."

It is insisted by the defendant that in the settlement with said attorneys he was overreached and defrauded, and also that the notes then given, in view of the previous settlement between the parties, were wholly without consideration. It will readily be seen from the foregoing statement that the questions thus raised are purely questions of fact, and as all questions of that character have been conclusively settled adversely to the defendant by the judgment of the Appellate Court, there is nothing left for us to do but to adopt the conclusions of that court.

The only questions of law presented by the record are those which arise upon the written propositions which the defendant asked the Circuit Court to hold as the law in the decision of the case. Nine such propositions were submitted on behalf of the defendant, the first five of which were marked "held" by the court. Of the four propositions refused, the first and second are substantially embodied in those marked "held." The third and fourth are simply to the effect that under the evidence the plaintiff was not entitled to recover. As the plaintiff made out his case by the production of the promissory notes sued on, and as the defenses urged were want of consideration, and misrepresentations by the plaintiff's attorneys whereby the defendant was induced to execute the notes, the adoption of those propositions would have been tantamount to holding as a matter of law that said defenses, or one of them, had been

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Syllabus.

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conclusively established. The evidence however is by no means so clear and satisfactory as to necessitate the conclusions contended for, but was susceptible of constructions leading to conclusions adverse to the defenses interposed. The questions presented were therefore questions of fact and not of law, and it would have been erroneous to hold as a matter of law that said defenses were proved.

There being no error in the record the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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SAMUEL S. CHISHOLM

v.

THEODORE WILLIAMS *et al.*

*Filed at Springfield April 5, 1889.*

1. **Mechanic's Lien**—*of the estate or interest to which the lien may attach.* The statute gives a mechanic's lien for labor or materials upon any estate or interest the owner may have in the premises at the time of making the contract. The statute gives the lien against a party in possession claiming to own the title, and it is not necessary to show the title any further, in order to create the lien.

2. **SAME—Time of payment—extension thereof.** To give a party furnishing labor and materials in the erection of a building a lien upon the premises, the contract must provide for payment within one year from the time stipulated for the completion thereof. If the price is to be paid within that time, a lien attaches, and it will not be lost by a subsequent extension of the time of payment.

3. **RENEWAL NOTE**—*whether it will operate as payment of the prior note.* As a general rule, a new note given in renewal of another one will not be regarded as a satisfaction of the first, unless there is an express or implied agreement to that effect.

4. A party entitled to a mechanic's lien for improvements on certain property, took the owner's note, payable within twelve months from the time fixed for the completion of the work, and transferred the same to a third party, who, on its maturity, took a new note in renewal of the same, giving further time for payment, and took judgment thereon. The original payee took an assignment of the judgment, and offered to

128	115
37a	399
128	115
61a	515
128	115
80a	127
128	115
104a	13

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Statement of the case.

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cancel the same in such manner as the court might direct: *Held*, that the latter had a right to a decree for a mechanic's lien on the original note, although the time when the renewal note fell due was more than one year after the time fixed for the completion of the work.

5. Costs—*on modification of decree—on appeal*. Where a decree for a mechanic's lien, on appeal, was modified by a reduction of the amount found to be due, but otherwise affirmed, this court directed that each party pay one-half the costs in this court.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Coles county; the Hon. C. B. SMITH, Judge, presiding.

This was a proceeding brought by Samuel S. Chisholm and Wellington C. Chisholm, partners, composing the firm of Chisholm Bros., against F. F. Randolph, the First National Bank of Charleston, the First National Bank of Norwalk, Ohio, Theo. Williams and Frank Goodnow, to enforce a mechanic's lien on certain mill property in Charleston, Illinois, for the payment of \$2105, due June 15, 1883, and the interest thereon.

The contract under which the labor was performed and the materials were furnished was as follows:

"A memorandum of contract entered into this 10th day of May, 1882, between Chisholm Bros., of Chicago, Illinois, of the first part, and F. F. Randolph, of Decatur, Illinois, of the second part.

"Witnesseth, that the party of the first part, for and in consideration of the sum of \$18,500, paid, as hereinafter described, by the party of the second part, hereby contract and agree to make or cause to be made the following improvements and work in the flouring mill at Charleston, Illinois, owned by said party of second part, viz.: A full set of Jonathan Mills' reduction machines, seven in number, with all their attachments and appurtenances. \* \* \* Above work is to be completed, the mill furnished and in running order, by the 1st day of August, 1882, and the party of the first part agree to hold themselves liable for any loss to the party of the second part

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Statement of the case.

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for any detention or delay in starting after said date of August 1, 1882; \* \* \* and in consideration of the faithful performance of above mentioned contract by the party of the first part, the party of the second part agrees and binds himself hereby, as follows: To pay or cause to be paid to the party of the first part, or their order, the sum of \$10,500 in cash during the performance of this work, as follows: All freights as they arrive, the weekly bills or wages of the workmen employed to do this work, and such other sums of money up to \$10,500 on the machinery and other articles furnished, as they arrive from this time to August 1; and at the expiration of the time set, and upon completion and satisfactory performance, as above stated, of said mill, he will (party of the second part) execute his promissory note for \$8000, in equal sums of \$2000 each, at three, six, nine and twelve months, respectively, to the party of the first part, or their order, adding to the six months and nine months notes \$70 and \$105, respectively, in lieu of interest on same. \* \* \* The party of the first part have the right conceded to them to use all material, lumber, belting, machinery, shafting, and other matters now in said mill, without cost to them, in the completion of said contract, but have no control over any material not so used."

The materials were furnished and the mill was completed according to the terms of the contract. The work was not completed, however, until the 15th day of September, 1882, but upon the completion of the work the mill was accepted by Randolph, and the four notes for the \$8000 remaining due were then all executed, due in three, six, nine and twelve months, as provided in the contract. These notes were all paid except the one for \$2105, due in nine months, which was assigned before maturity to Nordyke & Marmon Co., a corporation of the State of Indiana. Three days after the maturity of this note, and on June 18, 1883, Randolph executed to Nordyke & Marmon Co. a new note for \$2105, due in

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Statement of the case.

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four months, with interest at eight per cent, which was guaranteed by Chisholm Bros., and the old note was surrendered. Neither the old note nor the new one has ever been paid. A judgment, however, was rendered in favor of Nordyke & Marmon Co. on the new note, November 27, 1883, for \$2179.29, the amount of principal and interest. This judgment, at the time of the filing of the petition, was owned and held by Chisholm Bros., the petitioners, and they offered, in their bill, to cancel and satisfy the judgment in such manner as the court might direct.

As heretofore said, the petition was brought to collect the amount of the note which became due in nine months after it was executed, to-wit, June 15, 1883, which was executed for \$2105. As to the execution and delivery of the new note on the 18th of June, 1883, by Randolph to Nordyke & Marmon Co., for said sum of \$2105, in the place of the original note, it is alleged in the petition, that said last note was not a payment of said original note, and that there was no agreement or understanding between said Randolph and orators that such note should be in satisfaction or payment of the original indebtedness, but upon the contrary, orators aver that said indebtedness of \$2105, so originally evidenced by said third promissory note, remained due and wholly unpaid to your orators; that they have frequently requested said Randolph to pay the same, etc.

In the circuit court, the First National Bank of Charleston filed a disclaimer, and was dismissed out of the case. Randolph, after the cause was remanded from the Appellate Court, failed to answer, and a default was taken as to him. The other three defendants, the First National Bank of Norwalk, Ohio, Theo. Williams and Frank Goodnow, answered the bill. A replication was filed, and on a hearing before the court, a decree was rendered in favor of complainants, which was affirmed in the Appellate Court.

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Briefs of Counsel.

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Messrs. CRAIG & CRAIG, for the appellant:

When the contract is made with one having no title to the land, no lien will attach thereto. *Reed v. Houston*, 12 Iowa, 35; Rev. Stat. chap. 82, sec. 1.

Any improvement made by an outsider without the written consent of the railroad, would not create a lien on the realty. If it did, the railroad is a necessary party. *Dunphy v. Riddle*, 86 Ill. 26; *Crowl v. Nagle*, id. 440; *Scanlan v. Cobb*, 85 id. 296; *Gates v. Savings Bank*, id. 256.

The new note taken by Nordyke & Marmon Co., and the judgment thereon, operated as a discharge of the prior note. *Wilkinson v. Stewart*, 30 Ill. 58; *Smalley v. Edey*, 19 id. 211.

The taking the new note for the debt and interest was a waiver of the lien. *Kinzie v. Thomas*, 28 Ill. 505; *Conover v. Warren*, 1 Gilm. 501; *Cowl v. Varnum*, 37 Ill. 183.

Messrs. WILEY & NEAL, for the appellees:

The lien attached to any interest that Randolph may have had in the land. (Rev. Stat. chap. 82, sec. 2.) It extends to after-acquired interest in property. *Insurance Co. v. Batchen*, 6 Bradw. 621.

A person in possession is considered the owner. 2 Phillips on Mechanic's Liens, sec. 69.

The extension of the time of payment does not defeat the lien. *Paddock v. Stout*, 121 Ill. 571.

A mechanic's lien is assignable. *Insurance Co. v. Batchen*, 6 Bradw. 621; *Davis v. Billsland*, 18 Wall. 659; *Ritler v. Stevenson*, 6 Cal. 388; *Isage v. Bossieux*, 15 Gratt. 83; *Kenny v. Gage*, 33 Vt. 302; *Tuttle v. Howe*, 14 Minn. 150; Phillips on Mechanic's Liens, secs. 54, 55.

The taking of a note on account of a debt operates as a conditional payment, and the understanding of the parties is, that if paid, it shall discharge the original debt. Phillips on Mechanic's Liens, sec. 275; Sutherland on Damages, p. 375;

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Opinion of the Court.

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*Heartt v. Rhodes*, 66 Ill. 351; *Morrison v. Smith*, 81 id. 221; *Bond v. Insurance Co.* 106 id. 654.

A party may return the note and bring suit upon the original cause of action. *Stevens v. Bradley*, 22 Ill. 244; *Hughes v. Wheeler*, 8 Cow. 76; *McConnell v. Stettinius*, 2 Gilm. 707.

What constitutes a waiver must be determined from the circumstances of each particular case, it being essentially a question of intention, such intention implying either an actual determination of the lienholder to surrender the right, or such acts on his part that the public may reasonably suppose he had waived his security of lien. Phillips on Mechanic's Liens, sec. 273.

The time for instituting a suit to enforce the lien must have expired before the note or other security becomes due, in order to produce a waiver. Phillips on Mechanic's Liens, sec. 282.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

It is said in the argument, that the time of payment was extended beyond one year from the completion of the work, and this defeated the lien. Section 3, chapter 82, of our statute, entitled "Liens," provides: "When the contract is expressed, no lien shall be created if the time stipulated for the completion of the work or furnishing materials is beyond three years from the commencement thereof, or the time of payment beyond one year from the time stipulated for the completion thereof." Here, the work was completed on the 15th day of September, 1883, and the note in question was made payable in nine months from that time, which would be less than one year, and clearly within the terms of the statute.

But it is argued that the extension of the time of payment for four months after the note became due, made the money payable more than a year from the time of the completion of the contract, and thus the lien was lost. The same question arose in *Paddock v. Stout*, 121 Ill. 572, and we there held that

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Opinion of the Court.

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the extension of the time of payment after the execution of the contract would not defeat the lien,—that the lien depends upon the provisions which the contract makes as to the time of payment. Here, under the contract made by the parties, the time of payment was not extended beyond one year from the completion of the work, and complainants have not lost the lien conferred by the statute.

It is also claimed that Randolph had no interest in the premises in controversy on the 1st day of May, 1882, when he made the contract with the complainants, and upon this ground the decree is erroneous. Our statute does not require that a person should own the fee to enable a mechanic to obtain a lien. It declares: "The lien provided for \* \* \* shall extend to an estate in fee, for life, for years, or any other estate, or any right of redemption or other interest which such owner may have in the lot or land at the time of making the contract." The language here employed is very broad, and is sufficient to carry the lien to any title whatever that Randolph might possess when he entered into the contract. What title Randolph held when he entered into the agreement with the complainants we are not called upon to determine in this proceeding. The evidence shows that he was in possession of the premises, claiming to be the owner of the mill, when the contract was made. It also appears, that in 1881 the First National Bank of Charleston leased the premises to Neal Bros. for five years, with the privilege of buying. This contract was transferred by the Neal Bros. to Randolph as early as February, 1882, and he was placed in possession of the property. It will not be necessary to trace the title back from the First National Bank of Charleston, and show that the bank derived a title in fee or for years. It is enough that the evidence shows Randolph in possession of the premises, claiming title therein.

It is also claimed, in the argument, that the surrender of the note due June 15, 1883, and the acceptance of the note of June 18, 1883, payable to Nordyke & Marmon Co., and the

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Opinion of the Court.

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rendition of judgment thereon, was a payment of the original note, and a discharge of the lien given by the statute. If the last note, under an agreement of the parties, had been accepted as payment of the first note, there would be much force in the position of counsel; but such was not the case. It is shown by the evidence, beyond question, that there was no understanding or agreement that the last note should be accepted as payment of the first. We think it may be stated to be a general rule, that a new note given in renewal of another note will not be regarded as a satisfaction of the original note, unless there is an express or implied agreement that such was the intention of the parties.

If we are correct in this position, then it is clear that the debt due on the 15th day of June, 1883, (\$2105,) has never been paid or discharged, and as complainants have an assignment of the judgment rendered upon the note given in renewal, and were prepared to cancel it when the bill was filed, no reason is perceived why they could not maintain their bill, as held in the circuit and Appellate courts. But upon an examination of the decree rendered in the circuit court, it appears that the decree requires Randolph to pay \$2709.28 within a specified time, with interest from December 16, 1887. This was a larger sum than was actually due. The basis of the decree should have been the amount due June 15, 1883,—\$2105,—for which the original note was executed. Computing interest on this amount from June 15, 1883, until December 16, 1887, at six per cent,—four years, six months and one day,—the amount due will be \$2673.70,—\$35.59 less than the amount decreed to be paid.

As to the excess of \$35.59, the decree of the circuit court and the judgment of the Appellate Court will be modified. In all other respects they will be affirmed, each party to pay one-half of the costs in this court.

*Decree reversed in part and in part affirmed.*

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Syllabus. Statement of the case.

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R. JORDAN PRICHARD

v.

DAVID LITTLEJOHN.

*Filed at Springfield April 5, 1889.*

128	123
152	390
128	123
50a	673
128	123
203	*534
128	123
210	1244

1. **BILL FOR PARTITION—requisites—in setting forth the interests of all the parties.** A bill for the partition of land must set forth the interests of all the parties in the premises, as the court is required by the statute to find and declare the rights, title and interests of all parties. A bill which fails to do this is insufficient.

2. **SAME—cross-bill—not appropriate or necessary.** A cross-bill is not an appropriate pleading in a suit in chancery for the partition of land. The defendant, by requiring the complainant to file a proper bill and specifically answering the same, may obtain all the relief he can on a cross-bill. But by answering the cross-bill the complainant treats it as a proper pleading.

3. **SAME—allegations and decree—should correspond.** A cross-bill in a suit for partition averred that the complainant therein and one S. owned the premises as tenants in common, and showed that the complainant in the original bill had an interest in the land in common with the complainant in the cross-bill. The court, by its decree, found that the two complainants were tenants in common : *Held*, that there was a material variance between the cross-bill and the decree.

4. A cross-bill for the partition of land averred that the complainant was the owner of an undivided one-third interest in one of the tracts, and one S. of the other two-thirds, and this part of the bill was wholly disregarded in the decree : *Held*, that if it appeared on the hearing that the complainant in the original bill, and not S., was tenant in common with the complainant in the cross-bill, as the decree found, then the cross-bill should have been dismissed, unless it was amended so as to make it correspond with the proofs.

**APPEAL** from the Circuit Court of Fulton county ; the Hon. JOHN C. BAGBY, Judge, presiding.

This was a bill for partition, filed by the appellant, against appellee, November 26, 1886, on the chancery side of the Fulton circuit court, to the December term, 1886. The real controversy between the parties grows out of their conflicting claims of ownership to the undivided two-thirds of the north-

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Statement of the case.

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west quarter of the south-east quarter of section 13, town 5 north, range 2, east of the fourth principal meridian, in Fulton county, Illinois. By his original bill, appellant alleges that he and appellee are tenants in common to the whole of the south-east quarter of said section 13, appellee being the owner of an undivided  $13\frac{1}{3}$  acres, and he of the balance of the 160. There is a vague allusion to a deed from Abraham Littlejohn to appellee, but that part of the bill is wholly unintelligible. At the December term, 1887, the bill was amended, by alleging, "that on or about the . . . day of August, 1868, the defendant made a certain deed of conveyance, wherein he conveyed to Abraham Littlejohn, his brother, the north-east quarter of south-east quarter and one-third interest in south-west quarter of south-east quarter of section 13, town 5 north, range 2, east of fourth principal meridian, Fulton county, Illinois, and on the same day, and at the same time, the said Abraham Littlejohn conveyed to the grantor of your orator, Thomas H. Scoville, the two-thirds interest in the north-west quarter, and the like interest in the north-east quarter, and one-third interest in south-west quarter, all in south-east quarter of section 13, town 5 north, range 2, east of fourth principal meridian; but your orator says there was a mistake made in the description of the premises intended to be conveyed by the defendant to said Abraham Littlejohn, in the first mentioned deed, and while the description was therein as above set forth, yet, in truth and in fact, the intention of both grantor and grantee was, the former to convey and the latter to receive thereby and therein a two-thirds interest in the north-west quarter, the like interest in the north-east quarter, and one-third interest in the south-west quarter of section 13, town 5 north, range 2, east of the fourth principal meridian, Fulton county, Illinois; that at the time, all of said parties supposed that the said deeds were alike in their description of the premises designed and supposed to be conveyed, and immediately thereafter the said grantor of your orator (Thomas H. Scoville) entered into

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Statement of the case.

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possession of the premises, and all of the same, as described in his deed from the said Abraham Littlejohn to him, and occupied and held the sole, exclusive, visible, open and notorious possession of the said premises, in good faith and adverse to all the world, from that time until September, A. D. 1886, at which time your orator succeeded to his rights, and took the like possession of the same, and has held it to the present time; that the said Thomas H. Scoville paid the taxes on said lands, as described in the deed from Abraham Littlejohn to him, during all the said time he was in the possession of the same, and that your orator has paid the taxes since. Your orator alleges he is the sole, exclusive and real owner of the premises so conveyed to him by the said Thomas H. Scoville, and which he received from the said Abraham Littlejohn. Whereupon your orator claims that said deed from said defendant to Abraham Littlejohn should be reformed in said description to conform to the said intentions of the parties thereto, and your orator be decreed to be the real owner of the same, as the grantee of the said Thomas H. Scoville."

It will be seen appellant claims, by his amended bill, to be the owner of the undivided two-thirds of the north-east and north-west quarters, and one-third of the south-west quarter of said south-east quarter of section 13, but says nothing as to the ownership of the other interests.

The answer to this bill, as amended, denies that there was any mistake in the deed from appellee to Abraham Littlejohn, and denies that Abraham conveyed to Scoville a two-thirds interest in the north-west quarter, and denies that he had any such interest to convey. He admits, however, in this answer, that he did convey to said Scoville a two-thirds interest in the north-east quarter, as alleged.

An answer to the original bill also appears in the record, which is as unintelligible as the bill. In one clause it "admits R. Jordan Prichard, by certain deeds of conveyance, which were duly recorded, made and executed by the heirs of Abra-

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Statement of the case.

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ham Littlejohn, deceased, is owner in fee of the said described tract, less  $13\frac{1}{3}$  acres, undivided, which is alleged to belong to this defendant." In the next clause all this is in effect denied.

Replications were filed to these answers. At the March term, 1887, appellee filed a cross-bill, in which he avers that he is "seized in fee of an undivided one-third interest in the south-west quarter and the north-east quarter of the said south-east quarter of said section 13, and in fee simple of an undivided two-thirds interest in the north-west quarter of said south-east quarter of said section 13; that by purchase since the decease of said Abraham Littlejohn, R. Jordan Prichard became and is seized in fee simple of the south-east quarter of the said south-east quarter of said section 13; that Thomas Scoville became and is seized, by purchase, of an undivided two-thirds interest in the south-west quarter and the north-east quarter of said section 13, and of an undivided one-third interest in the north-west quarter of said south-east quarter of said section 13." To this cross-bill Thomas H. Scoville was made party defendant, as was also appellant. Scoville was not served with process, and the cross-bill was afterwards dismissed as to him. Without any amendment, and, so far as the record shows, (except by recital in the decree,) without any answer thereto, the court below proceeded to render a decree of partition upon said cross-bill alone, reciting, "*the court finds that the allegations of said cross-bill are true,*" but decreed that appellee, complainant in the said cross-bill, is entitled to one-third of the south-west and two-thirds of the north-west quarter, and that appellant is entitled to two-thirds of the south-west quarter and one-third of the north-west quarter of said south-east quarter of section 13, etc., making no disposition whatever of the north-east quarter. The decree also appoints commissioners to make partition according to the decree, and from that decree appellant appeals to this court.

The unsatisfactory state of the record, arising from the pleadings, is increased by what appears to have taken place

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Statement of the case.

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at the hearing. A report of the master in chancery, reciting that the case had theretofore been referred to him, shows, "that he has examined the title to the lands described, and finds that by divers deeds, as appears recorded on the land records of said county, the title to said land described in the foregoing deposition of Thomas H. Scoville, all passed into the said Thomas H. Scoville, except the undivided one-third of the south-west quarter of said quarter section, which remained and still does remain in David Littlejohn, and that by deed of date September 13, 1886, said Thomas H. Scoville conveyed the north-half and the undivided two-thirds of south-west quarter of said south-east quarter, section 13, town 5 north, range 2 east, to R. Jordan Prichard, and that the said R. Jordan Prichard is now the owner in fee, as appears, and under said deed, of the north half and the undivided two-thirds of the south-west quarter of south-east quarter, section 13, and David Littlejohn is the owner in fee of the undivided one-third interest in said south-west quarter of south-east quarter, section 13, in town 5 north, range 2 east." No order of reference to the master appears in the record. No exceptions whatever appear to this report, and the decree recites that the testimony was taken in open court, and a bill of exceptions and an amended bill of exceptions appear in the record, purporting to contain the evidence introduced on the trial. Numerous deeds were offered, but not one of them appears in the bill of exceptions, and they are shown only in the form of an abstract, giving date, parties, and a general description of the premises conveyed, and, in some instances, the consideration appears in the amended bill of exceptions.

Mr. J. W. BANTZ, for the appellant.

Mr. D. ABBOTT, and Mr. H. W. MASTERS, for the appellee.

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Opinion of the Court.

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Mr. JUSTICE WILKIN delivered the opinion of the Court:

After the foregoing statement little need be said by way of opinion in this case. The cross-bill was improperly filed. Appellee, by requiring appellant to file a proper bill, and specifically answering the same, could have obtained all the relief he seeks by the cross-bill. There seems, however, to have been no objection to it. By answering, appellant treated the cross-bill as a proper pleading in the case, and the court below makes it the basis of its decree.

There is a material variance between the allegations of this cross-bill and the decree. The cross-bill alleges that appellee and Thomas H. Scoville are tenants in common, and shows that appellant has no interest whatever in common with him. The decree drops Scoville out of the case, ignores the allegation as to his interest, and, contrary to the averments of the cross-bill, finds that appellant and appellee are tenants in common. Not only so, but the cross-bill avers that appellee is the owner of an undivided one-third interest in the north-east quarter, and Scoville of the other two-thirds, and this part of the bill is wholly disregarded in the decree. If it appeared, on the trial, that appellant, and not Scoville, was tenant in common with appellee, as the decree finds, then the cross-bill should have been dismissed, unless appellee chose to amend it so as to make it correspond with the proofs.

The decree is unsupported by the cross-bill, and for that reason must be reversed. Had the decree been based on the original and amended bills, it would have been equally erroneous. By the original bill, appellant claims title to the whole of the 160 acres, except the undivided  $13\frac{1}{3}$  acres in appellee. By the same, as amended, he only claims a two-thirds interest in the north-east quarter and north-west quarter, and one-third interest in the south-west quarter, and wholly fails to set out the title as to the remaining interests.

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Syllabus.

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A bill for partition must set forth the interests of all parties interested in the premises. The court must ascertain and declare the rights, title and interests of all parties to the suit. These are plain requirements of the statute, and must be conformed to. As has been said by this court, when it is considered that titles to valuable lands can be divested by this statutory proceeding, it is essential that the statute should be observed, and it has often been held, that a decree in partition which fails to find the respective interests of the several tenants in common, is erroneous.

As we are compelled to reverse this decree and remand the cause, that the issue between the parties may be presented by proper pleadings, we shall express no opinion at this time as to the merits of the respective claims of the parties to the north-west quarter of the south-east quarter of section 13.

The decree of the court below will be reversed, and the cause remanded, with leave to the respective parties to amend their pleadings and introduce further proofs, if they shall so desire.

*Decree reversed.*

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ISAIAH V. WILLIAMSON *et al.*

128	129
160	575
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129	
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250	

v.

ISAAC STONE *et al.*

*Filed at Springfield April 5, 1889.*

1. **DEED OF TRUST—with power of sale—trustee as the representative of both parties.** Where a trust deed is made to secure a debt, the trustee named therein is the representative, not only of the owner of the debt, but also of the maker of the deed. He is the agent of both the creditor and the debtor. His duty is to act fairly toward both, and not exclusively in the interest of either. The law requires the conduct of such a trustee to be absolutely impartial, as between the two parties whom he represents. Hence, his relations with one of them ought not to be of such a character as to tempt him to neglect the interest of the other.

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Brief for the Appellants.

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2. SAME—*trustee fixing amount of bid.* It is not proper for a trustee appointed in a deed of trust, to direct the representative of the creditor what bid he shall make, but it is his duty to offer the property at public auction, in such a way as to make it bring the highest possible price, and to leave the parties to decide for themselves what they will offer for it.

3. SAME—*setting aside trustee's sale—redemption—in equity.* A trustee after the sale wrote to the creditor: "We bid the property off for \$9000, and shall take judgment for the balance of about \$4000. \* \* \* My impression is, we had better get a quitclaim deed from Mr. S. (the debtor,) and, if you desire, will have one sent to him to sign. I did not bid the whole amount on the property, as I thought, by having four or five thousand dollars hanging over him, he would be more willing to give us a deed of the property." It appeared that the trustee was the confidential adviser and the business agent of the creditor, and employed one of his attorneys to bid on the property, and directed the amount of the bid at much less than the value of the property, for the purpose of forcing the debtor to make a deed: *Held*, that the action and conduct of the trustee were such as to require the setting aside of the sale and allowing a redemption.

4. A court of equity will always examine with the closest scrutiny a sale that is made under the power contained in a trust deed, and when the rights of third persons have not intervened, redemption from such a sale, conditioned upon the full payment to the holder of the indebtedness of all that is due him, will be allowed, when there is evidence of any such unfairness on the part of the trustee, whether intentional or not, as has resulted in injury to the debtor.

5. *LACHES—knowledge of the facts, essential.* Where the facts relied on to set aside a trustee's sale of property under a power in a trust deed are not discovered until after the filing of the original bill, and they are, when discovered, set up by an amended bill, *laches* will not be imputable to the complainant.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

Messrs. GREGORY, BOOTH & HARLAN, for the appellants:

No request by the beneficiary is necessary to authorize a trustee to make a sale. *Booth v. Wiley*, 102 Ill. 84.

The trustee is not bound to delay a sale to wait for a more favorable time. 2 Jones on Mortgages, sec. 1875; *Franklin v. Green*, 2 Allen, 519; *Dary v. Durrant*, 1 DeG. & J. 535.

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Brief for the Appellees.

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Inadequacy of price, unless so gross as to raise a presumption of fraud, is no ground to set aside the sale. *Jenkins v. Pierce*, 98 Ill. 646; *Hoyt v. Pawtucket Institution*, 110 id. 390; *Hoodless v. Reid*, 112 id. 105.

The sale will not be set aside for mere irregularities, when fairly and honestly conducted. *Dawkins v. Patterson*, 78 N. C. 384; *Markey v. Langley*, 92 U. S. 142; *Smith v. Black*, 115 id. 308.

The appellee is not entitled to redeem, from his long acquiescence, and *laches*. *Insurance Co. v. Boggs*, 121 Ill. 119; *Burr v. Borden*, 61 id. 389; *Dempster v. West*, 69 id. 613; *Bush v. Sherman*, 80 id. 160; *Gibbons v. Hoag*, 95 id. 45; *Jenkins v. Pierce*, 98 id. 646; *Hoyt v. Pawtucket Institution*, 110 id. 390; *Howe v. South Park Comrs.* 119 id. 101.

Mr. WILLIAM C. GOUDY, for the appellees:

This is not a bill to set aside a sale, but is a bill to redeem from a mortgage which has not been foreclosed.

Phelps was disabled from executing the power of sale as a trustee. He was acting for Williamson, and seeking to promote his interests. He could not occupy a double position. *Miles v. Wheeler*, 43 Ill. 126.

Sales under a power being liable to abuse, are watched jealously by courts of equity. *Burr v. Borden*, 61 Ill. 389; *Longwith v. Butler*, 3 Gilm. 33.

There was no actual sale, but only one of form, for the purpose of cutting off the equity of redemption, and the sale, in the manner in which it was conducted, was not one within the terms of the power. The conduct of Phelps was unfair, and the Stones were injured by his act.

As the bill is not to set aside a sale for irregularity, but to redeem, there is no *laches*, and hence the cases cited do not apply.

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Opinion of the Court.

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Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is a bill to redeem from a sale made under a trust deed. By trust deed, dated June 17, 1875, Isaac Stone and his wife Julia A. Stone conveyed three lots in Chicago, with the improvements thereon, known as Nos. 122, 124 and 126 Quincy Street, to Erskine M. Phelps, as trustee, to secure a note for \$12,000.00 of same date made by Isaac Stone, payable to L. V. Williamson three years after date, with interest at eight per cent per annum payable semiannually. Stone lived in Northampton, Massachusetts, Williamson in Philadelphia, Pennsylvania, and Phelps in Chicago. The note was given for money loaned by Williamson, through Phelps, to Stone. The sale was made by the trustee on December 23, 1878, for the nonpayment of the principal note and the last interest note, both of which fell due on June 17, 1878. The property was sold to Williamson for \$9000.00, and a trustee's deed was executed in pursuance of the sale. This bill was filed on August 11, 1883, by Stone and wife against Williamson and Phelps. The Circuit Court allowed the redemption and decreed in favor of the complainants. This decree having been affirmed by the Appellate Court is brought before us by appeal from the latter Court.

Where a trust deed is made to secure the payment of a debt, the trustee named therein is the representative, not only of the owner of the indebtedness, but also of the maker of the trust deed. He is the agent of both the creditor and the debtor. His duty is to act fairly towards both, and not exclusively in the interest of either. The law requires the conduct of such a trustee to be absolutely impartial as between the two parties whom he represents. (*Ventres v. Cobb*, 105 Ill. 33; *Cassidy v. Cook*, 99 id. 385; *Meacham v. Steele*, 93 id. 135.) Hence, his relations with one of them ought not to be of such a character as to tempt him to neglect the interests of the other.

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Opinion of the Court.

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We do not think that Phelps, the trustee in the present case, was guilty of any intentional fraud in his conduct towards Stone. But at the time the trust deed was executed, and from that time to the date of the sale and thereafter, he was the agent of Williamson in making and collecting the loans and looking after the business of the latter in Chicago. As a consequence of the relation which he thus sustained, he so conducted the sale under the trust deed as to make it enure to the advantage of Williamson and to the disadvantage of Stone. We can not go into a lengthy examination of the testimony, which consists mainly of correspondence between Stone and Phelps, and between them both and Williamson, but will only glance at a few features of it.

Three days after the sale, towit: on December 26, 1878, Phelps thus wrote to Williamson: "On the 23d inst., I bid in the property and should have written you the next day, but did not, on account of two real estate brokers assuring me they had an offer for the property sufficient to pay us out in full. \* \* \* We bid the property off for nine thousand dollars, and shall take judgment against Mr. Stone for the balance of about four thousand dollars. \* \* \* My impression is, we had better get a quit-claim deed from Mr. Stone, and, if you desire, will have one sent for him to sign. I did not bid the whole amount of the property, as I thought by having four or five thousand (dollars) hanging over him he would be more willing to give us a deed of the property."

This language, literally interpreted, would convey the idea, that Phelps was not only auctioneer at the sale, but bidder as well. The testimony, however, shows that an attorney by the name of Francis W. Jones bid off the property for Williamson. Although Jones collected some rents and remitted them to Williamson, and perhaps transacted some other business for him, yet as matter of fact he was the attorney of Phelps. He never saw Williamson, and what he did for the latter he did at the request and under the direction of Phelps. Jones con-

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Opinion of the Court.

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sulted with Phelps before the sale as to the amount to be bid, and was present at the sale at the request of Phelps. Phelps says in his testimony that he exercised his own judgment as to the amount of the bid, and struck the property off at \$9000.00, and that he has no recollection of receiving any instructions from Williamson as to the sum to be bid. It thus appears, that, although Jones made the bid, the trustee fixed the amount of it.

As is usual in such cases, there is conflict in the testimony as to the value of the property. Some of the witnesses say that it was only worth \$9000.00 at the time of the sale, others place its value at that time at \$22,000.00 and \$25,000.00. Phelps says it was worth \$24,000.00 in 1875 when the trust deed was made, and Magill, one of the real estate experts, states that there was no difference in values in the years 1875 and 1878. It appears from letters written by Phelps to Williamson and Stone early in December, that negotiations were then going on with certain brokers for a private sale of the property at \$15,000.00. The letter of December 26th as above quoted shows that Phelps had been assured, up to the day after the sale under the trust deed, of an offer sufficient in amount to cover the total indebtedness, which was not less than \$13,000.00.

But, whatever may have been the value of the property on December 23, the amount bid for it on that day was not determined with reference to the value, but with reference to the possibility of forcing a quit-claim deed from Stone. It was not proper for the trustee to direct the representative of Williamson what bid he should make. It is the duty of the trustee to offer the property at public auction in such a way as to make it bring the highest possible price, and to leave the parties to decide for themselves what they will offer for it. But even if it had been allowable for Phelps to advise Jones what to bid, it was his duty to base that advice upon his own deliberate judgment as to the value of the property. Instead

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Opinion of the Court.

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of this, he determined the amount of the bid by his opinion as to the amount of unpaid indebtedness, which it would require to force Stone to give a quit-claim deed. This is a matter of which Stone has a right to complain, because such conduct on the part of the trustee, who was his agent as well as the agent of Williamson, unquestionably prevented the property from bringing what it ought to have brought. Stone was injured and prejudiced by the fact that a large indebtedness was left hanging over him, which might have been cancelled, if Phelps had pursued a different course.

A court of equity will always examine with the closest scrutiny a sale that is made under the power contained in a trust deed, and where the rights of third persons have not intervened, as is the fact in the case at bar, redemption from such a sale, conditioned upon the full payment, to the holder of the indebtedness, of all that is due to him, will be allowed where there is evidence of any such unfairness on the part of the trustee, whether intentional or unintentional, as has resulted in injury to the debtor.

We do not think there is any ground for the charge of laches against the appellees, because the facts above set forth were not discovered until after the filing of the original bill in this cause. When they were discovered, the original bill, to which laches may have been a successful defense, was amended by setting them up.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Mr. JUSTICE SHOPE, not having been present at the argument of the case, took no part in its consideration.

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Syllabus.

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GEORGE F. TYLER *et al.*

v.

A. D. SANBORN *et al.*

Filed at Springfield April 5, 1889.

128	136
37a	101
129	136
150	206
151	625
153	63
28	136
98	1 89
98	2 89
28	136
15	559

1. AGENCY—*agent dealing in the subject matter of his agency.* An agent appointed to sell property can not, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal freely given, after full knowledge of every matter known to the agent which might affect the interests of the principal.

2. It is of no consequence in such a case that no fraud was actually intended, or that no advantage was, in fact, derived from the transaction, by the agent. The rule is not merely remedial of wrong actually committed, but is intended to be preventive of wrong.

3. An agent may undoubtedly buy of his principal and have an interest in the sale of property belonging to his principal, but in such case the burden is upon the agent to show that the principal had knowledge, not only of the fact that the agent was buying or interested, but also of every material fact known to the agent which might affect the principal, and that having such knowledge, he freely consented to the transaction. This rule is equally applicable to cases where the agent is empowered to sell at a stated price, as when his authority is to sell generally.

4. An agent was appointed by non-resident owners of real estate to look after the same and collect rents, and procure offers of purchase, to be submitted to his principals. He reported an offer of \$1000 by B. for the property. The offer was accepted and a deed sent to the agent for delivery on payment of that sum. B. declined finally to make the purchase, when the wife of the agent agreed to take the property at the price named, and B. made her a deed, and she paid the price to her husband, and the two deeds were recorded, placing the legal title in the wife. This was done without the knowledge of the principals, and no fraud in fact was intended: *Held*, that the transaction amounted to a sale by the agent to his wife, and was fraudulent in law, and that the principals, upon learning the facts, had the right to have the sale and the deeds set aside.

5. Where the owners of real property sent to their agent a deed, to be delivered, on payment of \$1000, to one who had made an offer to purchase at that price, it was *held*, that the agent had no authority to use the grantee in such deed as a mere trustee to convey the title to

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Brief for the Appellants.

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the agent, or to some one else, so that the agent might have an interest in the property. The law will not allow an agent to occupy a position in which he may be tempted to betray his trust.

6. ALLEGATIONS AND PROOFS—*in chancery—proof of any one of several grounds of relief sufficient.* If, from the allegations in a bill to set aside a sale made by an agent, and the facts proved, the transaction is deemed fraudulent in law, it is immaterial whether the allegations of fraud in fact are proved or not. If any alleged ground of relief is shown by the evidence, it will be error to dismiss the bill.

7. HUSBAND AND WIFE—*of their status under existing legislation—in respect to property rights.* Although the statute has so far changed the common law that a wife can now contract with her husband, and has abolished his estate in her lands during coverture, it has not denied to either all interest in the property of the other. The husband is still the head of the family, and the expenses of the family and of the education of the children are chargeable upon the property of both, or either of them, in favor of creditors. The husband still has an interest in his wife's real estate.

APPEAL from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

Messrs. KERRICK, LUCAS & SPENCER, for the appellants:

An agent for the owner of real estate has no right to speculate on property committed to his care, nor has he any right to put himself in a position adverse to the interest of his principal. *Hughes v. Washington*, 72 Ill. 85; *Zeigler v. Hughes*, 55 id. 288; *Cottom v. Holliday*, 59 id. 179; *Coat v. Coat*, 63 id. 74.

Two deeds or contracts executed at the same time constitute but one transaction. *Kruse v. Steffens*, 47 Ill. 115.

The law will not permit an agent to buy at his own sale. (*Coat v. Coat*, 63 Ill. 74; *Ebelmessier v. Ebelmessier*, 99 id. 548.) And that is the law, even if the sale is to be at a fixed price. *Ruckman v. Bergholtz*, 37 N. J. L. 437; *Porter v. Woodruff*, 36 N. J. Eq. 174.

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Brief for the Appellees. Opinion of the Court.

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Mr. ISAAC N. PHILLIPS, and Mr. JAMES S. EWING, for the appellees:

The sale to Beard was not colorable, and his name was not used for the purpose of deceiving appellants, and there was no actual fraud perpetrated or attempted.

But even if Sanborn, as agent, failed in his duty to his principals, and had reported ever so falsely as to the value of the property, that could not affect the purchaser having no knowledge of the agent's bad faith.

The purchase by the agent's wife is not a purchase by him. A wife may contract even with her husband. *Thomas v. Mueller*, 106 Ill. 36.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

George F. Tyler and Edwin S. Tyler, as executors of the last will and testament of Frederick Tyler, deceased, were the owners of certain lots in the village of Chenoa, in McLean county. George F. Tyler resided in Philadelphia, Pennsylvania, and Edwin S. Tyler resided in Hartford, Connecticut. They employed O. D. Sanborn, who resided in Chenoa, to take charge of the property, rent it, and procure a purchaser for it. He was to obtain offers to purchase, and report to them, leaving them to accept or decline the offers, as their judgments should direct. After some futile efforts in this way, Royal E. Beard proposed to pay \$1000 for the property, and take it as it was, they removing the incumbrance occasioned by a tax sale made before that time, then supposed to be upon it. Sanborn reported this offer to the Tylers, and they accepted it, and forwarded to Sanborn a deed of the property. When Sanborn received the deed, he notified Beard of the fact, and that he was ready to deliver it. What then took place is thus narrated by the several witnesses:

Sanborn says: "I notified Mr. Beard that the deed was ready for him, and he said he was sorry,—that he hoped they

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Opinion of the Court.

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would not accept it. I said I hated to have him back out on the property, and would like to complete the trade as we had started, and I did not want to return any more papers; that they had found fault with the others, and they would begin to think that it was all boy's play out here, and too much of that returning papers, and he finally said he would let me know that evening whether he would take it or not. That evening he came in and said he did not want the property, and did not want to take it. I had no written contract with him, and he had paid nothing, and I still had possession of the deed when he told me he did not want the property. When I was at home that evening, I was telling my wife that I was afraid I was going to have trouble to sell that property; that Beard had come in, and did not want it, and I was feeling that my labors had all been in vain, and she spoke up and said, if Beard wanted to sell it for what he gave for it, she would buy and take it off his hands. He said he would let her have it at what he gave for it if she would take it. Mr. Beard, the next day, I think, brought his wife in, and they executed a deed to my wife, and my wife paid the money. Beard never paid me any money. He never furnished any of the money. I presume I had a talk with my wife about it before that evening. She knew the price I was selling to Fales for, and knew that I was acting for eastern parties. I told her I thought she did not want to buy the property. I did not tell her what I thought it was worth. I was just eating supper, and told her he was going to back out, and she said she would take it at that price, and I opposed buying it, and she insisted on buying. I never reported any of these facts to the Tylers. Before this time I had never expressed any opinion to my wife as to what I thought the property was worth. I had been married about three years, and was post-master. My wife was in no business, but had some means. It was invested in notes and certificates of deposit. I looked after making investments and buying notes for her, after consulting with her. No one else

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Opinion of the Court.

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did any business for her." On cross-examination he said, among other things: "At the time of the purchase of this property my wife had about \$3500, but I had no means." And again, speaking of Beard's refusal to take the property, he repeated: "I then went home, and had this talk with Mrs. Sanborn—told her I thought the sale would go up, and she said she would take the property. She was able to do so, and bought it against my objection. Up to that time she had been loaning her money. Beard came in again that evening, and I told him what my wife had said about it, and he said he would make a deed to her, and he did so the next day. I took the deeds to Bloomington, here, and had them recorded, as an accommodation to my wife and Mr. Beard. She paid the money and I sent it to Mr. Tyler. I have no interest, either absolute or conditional, in any shape or form, in the property, except my dower."

Frances C. Sanborn said: "When he (her husband, O. D. Sanborn,) reported to me that Beard probably would not take the property, I said, 'I will take it,—that is, if Mr. Beard will sell it to me for the same price he was to give the Tylers.' He said I did not want it, and I said I wanted to put my money into something solid, and he further objected, and told me of the cracks in the walls, and the disrepute it was in, and I still said I thought it was very cheap, and that I wanted to take it. It was an impulsive conversation on my part. I never had thought of it before. I told him to tell Mr. Beard I would take it. I don't remember when the next conversation was. It was some time before I paid for it. I paid Mr. Sanborn. I remember making up the money to pay him, but don't remember what the amounts were made up from. That was when Mr. Sanborn had completed his arrangements, so he could send the purchase money. It was not the same day I had the other talk. I should think it was some weeks. The deed was made and delivered to Beard, and from Beard to me, without any money having been paid to anybody. I

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Opinion of the Court.

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don't know how the money was sent to Mr. Tyler, nor where it was gotten to send to him. The same evening Mr. Sanborn told me about the property,—that Beard would not take it,—he told me I could have it. At that time Mr. Sanborn had charge of my business affairs, but I advised with no one about buying this property." On cross-examination, she again said: "He (Sanborn) said Mr. Beard would sell it to me just as he had bought it, if I would take it off his hands. We then talked it over, and I made up my mind that I still wanted it, and he said to me that if I was bound to have it, he would tell Mr. Beard to-morrow, and have the deeds made. There was no agreement or understanding between Mr. Beard and myself that it was a purchase for me, or that he was to have any interest in it. Prior to the time I have spoken of, there was no understanding that the property should be sold to Beard, and by Beard to me."

Beard said, after speaking of his offer to buy, his ability to pay, etc.: "I offered him \$1000 cash. Several weeks after, he came to me and informed me that my offer had been accepted. I told him, that upon considering the matter I had decided not to take the property. He urged me to take it, and I told him I would consider the matter, and call at his post-office that evening. I called on him that evening, and told him I had decided not to take it, and he told me his wife, Frances C. Sanborn, would take the property if I would deed it to her without expense to her, and I did so. I never paid anything for those lots, and never received any money or anything for them."

Evidence was introduced tending to show that the lots were, at the time these deeds were made, worth much more than \$1000, and there was, on the other hand, other evidence introduced tending to rebut that. Perhaps a fair deduction from the evidence is, that the lots were generally estimated as worth more than \$1000, but that all real estate, and especially in Chenoa, was, at that time, difficult to sell, and that it

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Opinion of the Court.

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is not clear that any person was then ready to pay, in cash, more than \$1000 for these lots; but in the view that we shall take of the case, it may be admitted that there was not such inadequacy between the price paid and the actual value of the lots, as, of itself, to raise a presumption of a fraudulent intent.

The bill asks to have the deeds set aside as fraudulent as against the rights of the Tylers. The decree dismissed the bill at the complainants' costs. If, from the allegations in the bill and the facts proved, the transaction is one deemed fraudulent in law, it can, of course, be of no consequence that the allegations of fraud in fact are not proved. If any alleged ground of relief is proved by the evidence, the decree below is erroneous, and must be reversed.

The evidence quoted *supra* can leave no doubt on the mind as to the real character of the transaction. It was, in effect, a sale and conveyance to Frances C. Sanborn, by her husband, O. D. Sanborn, as the agent of the Tylers, without their knowledge. The sale to Beard was not consummated. He refused to take the property, but became an agent, in fact, for Frances C. Sanborn, whereby she was enabled to obtain the legal title. In equity, the execution of the deed by Beard to her, and the delivery thereafter of both deeds to her, was but the execution and delivery of a deed to her by the Tylers, without their knowledge.

Admitting that the price paid for the property was not grossly inadequate, and that it was one with which, if it had, in good faith, come from Beard, the Tylers would have been satisfied, the question is still left whether the fact that the purchase was made by the wife of their agent, without their knowledge, of itself, alone, renders the deeds voidable, at their election.

The doctrine is familiar, and has been often recognized by this court, that an agent can not, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent

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Opinion of the Court.

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of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal. (*Coat v. Coat*, 63 Ill. 74; *Ebelmessier v. Ebelmessier*, 99 id. 548; *Zeigler v. Hughes*, 55 id. 288; *Hughes v. Washington*, 72 id. 85.) It is of no consequence, in such case, that no fraud was actually intended, or that no advantage was, in fact, derived from the transaction by the agent. Kerr on Fraud and Mistake, (Bump's ed.) 173, 174; Perry on Trusts, sec. 206; Story's Eq. sec. 315; Bispham's Eq. (2d ed.) p. 299, sec. 238. The rule is not merely remedial of wrong actually committed,—it is intended to be preventive of wrong. Public policy requires, as was tersely and forcibly said by the Chief Justice in *Staats v. Bergen*, 2 C. E. Green, 554, that "a trustee may not put himself in a position, in which, to be honest, must be a strain on him." An agent may undoubtedly buy of his principal, or have an interest in the sale of property belonging to his principal; but in such case the burden is upon the agent to show that the principal had knowledge, not only of the fact that the agent was buying or interested, but also of every material fact known to the agent which might affect the principal, and that, having such knowledge, he freely consented to the transaction. *Porter v. Woodruff*, 36 N. J. Eq. 174; *Dunne v. English*, (L. R. 18 Eq. Cases, 524,) 10 Eng. Rep. (Moake's notes,) 837. See, also, notes to *Fox v. Mackreth*, *Pitt v. Mackreth*, 1 L. C. in Eq. (Hare & Wall. notes,) 3d Am. ed. pp. 209, 210, *et seq.*; id. p. 220. The rule is equally applicable to cases where the agent is empowered to sell, as in the present case, at a stated price, as where his authority is to sell, generally. 1 Am. & Eng. Encyclopedia of Law, p. 376, and cases cited; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Ruckman v. Bergholtz*, 37 N. J. L. 437; *Peckham Iron Co. v. Harper*, 41 Ohio St. 108.

It is plain, then, that under the authority to deliver the deed to Beard for the \$1000, no authority was conferred to use Beard as a mere agent or trustee to convey the title to Sanborn or to some one else, so that he would have an interest in it,

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Opinion of the Court.

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merely because the Tylers would thereby receive the same money they would have received had the deed been delivered to Beard. The Tylers are allowed to treat the conveyance as void, at their election, not because they have been injured, but because the law will not allow their agent, Sanborn, to occupy a position in which he might be tempted to betray his trust. (See cases cited *supra*, and notes to *Fox v. Mackreth* and *Pitt v. Mackreth*, *supra*, at p. 211.) When Beard declined to take the property, the Tylers were entitled to know that Sanborn had concluded to let his wife take it, unless, indeed, it can be held that the conveyance to her was as much a matter of indifference to him, in a legal sense, as if it had been to a stranger,—and that is, in effect, the contention of counsel for appellees.

Such a sale, at common law, would clearly have been voidable, both because the wife, there, had no independent power to contract, and because the husband would have taken an estate during coverture in the property. See 1 Blackstone's Com. (Sharswood's ed.) p. 441, \*442; Reeve's Domestic Relations, (2d ed.) 98, \*99; and also id. 28. Notwithstanding that our statute has so far changed the common law that the wife can now contract with the husband, and has abolished his estate during coverture, it has not denied to each all interest in the property of the other. The husband is still the head of the family, and the expenses of the family and of the education of the children are, by section 15 of the statute in relation to "Husband and wife," charged upon the property of both husband and wife, or of either of them, in favor of creditors. (Rev. Stat. 1874, p. 577.) Upon the death of the wife, intestate, without children surviving, the husband inherits one-half of her real estate. (Rev. Stat. 1874, p. 39, sec. 1.) And, in any event, upon her death he is entitled to dower in her real estate. Hence the husband still has a pecuniary interest, greater or less, as circumstances may vary, in all the real estate of which his wife may be owner during coverture. There

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Opinion of the Court.

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is, moreover, apart from this pecuniary interest, an intimacy of relation and affection between husband and wife, and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position, as between his wife and a stranger, in a business transaction. He may, by reason of his great integrity, be just in such a transaction; but unless his marital relations be perverted, he can not feel disinterested,—and it is precisely because of this feeling of interest that the law forbids that he shall act for himself in a transaction with his principal. It is believed to be within general observation and experience, that he who will violate a trust for his own pecuniary profit, will not hesitate to do it, under like circumstances, for the pecuniary profit of his wife.

In our opinion, the policy of the law equally prohibits the wife of the agent, as it does the agent himself, from taking title to the property which is the subject of his agency, without the knowledge and express consent of the principal. The wife is here shown to have known the relation of her husband to the Tylers in respect to this property, and all the facts in regard to the transaction with Beard. She is therefore charged with knowing that she could not become the purchaser without letting the Tylers know it, and the burden is on her to show that they did know it.

The Tylers are, in our opinion, entitled to have these conveyances cancelled, upon returning to Frances C. Sanborn what they have received, with accruing interest; and as against this, they are entitled to a deduction of the reasonable value of the rents and profits, above and beyond the amount paid for taxes and necessary repairs.

The decree below is reversed, and the cause remanded to the circuit court, with directions to there enter a decree in conformity with this opinion.

*Decree reversed.*

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Mr. Justice BAILEY, dissenting.

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Mr. JUSTICE BAILEY, dissenting:

I am unable to concur with the majority of the court in this case. The evidence shows, and that too without any controversy, that Mrs. Sanborn, learning from her husband that Beard had declined to take the property in question at the price previously agreed upon by him, and at the price which the owners had agreed to and were willing to take, offered to become the purchaser; that such offer was made by her wholly upon her own motion, and not at the suggestion but against the advice and remonstrance of her husband; that she did thereupon become the purchaser of the property, and paid for it out of her own separate estate, and that in the whole transaction, the business was conducted, so far as she was concerned, by herself, her husband in no way assuming to act or in fact acting as her agent.

It is assumed in the opinion of the majority of the court and I think correctly, that no fraud in fact is shown, the decision being based wholly upon the assumption that there was such fraud in law as must necessarily invalidate the transaction. I make no question as to the soundness of the doctrine that an agent employed by another to sell his property can not, either directly or indirectly, become the purchaser, and that if he does so, his principal may interpose and avoid the sale. But that is not this case. The purchaser here was not the agent, but another person who was *sui juris*, and capable of acquiring, owning and controlling her separate property wholly independent of any control or interference on the part of her husband.

The opinion treats the purchase by the wife as being the same in legal effect as though made by the husband. This doubtless would be the case if the wife were still laboring under the disabilities imposed by the rules of the common law. But our statute has so far emancipated her from those disabilities as to place her in all essential respects, in the same legal position, so far as property rights are concerned, as though she

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Mr. Justice BAILEY, dissenting.

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were a *feme sole*. Her separate estate is no longer subject to either the rights or the control which, at common law, resulted to the husband from the marital relation. She now has the same control over her estate that the husband has over his. She has the same legal power to acquire property, to buy and sell, or engage in business, she would have if she were unmarried. In respect to property rights and business transactions she is, in contemplation of law, a stranger to her husband, and may act independently of him, or assume a position adverse to his. I can not therefore yield assent to the proposition that, as the law now stands, the wife of an agent must, as a matter of law, be held to be subject to the same legal incapacity to become the purchaser of the property which is the subject matter of the agency as is the agent himself. Whether a purchase by her is to be treated as fraudulent, and therefore voidable at the instance of the vendor, must, in my opinion, depend upon the circumstances, and such purchase therefore presents a question of fraud in fact and not of fraud in law.

I do not question that the relation between the agent and purchaser, whether as husband and wife or otherwise, is a circumstance to be considered in connection with other evidence, whenever fraud in fact is charged. Slighter evidence will be required to raise an inference of fraud where the agent and purchaser sustain to each other some near relation, such as parent and child, brother and brother, or husband and wife, but such inference can not arise from the mere relation alone. In all such cases fraud in fact must be charged and proved, and the relation between the parties can be considered only as bearing upon the measure of proof required to sustain the charge.

As no fraud in fact is proved in this case, I am of the opinion that the decree of the Circuit Court should be affirmed.

Mr. CHIEF JUSTICE CRAIG: I concur in the views expressed by Mr. Justice BAILEY.

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Syllabus.

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**JAMES BROWN et al.**

v.

**MINER, FROST & HUBBARD.**

*Filed at Springfield April 5, 1889.*

1. **CHANCERY—trial by jury—upon what issues.** The statute of this State requires the submission to a jury of an issue arising upon the contest of a will on the ground of the alleged insanity of the testator, or of his want of mental capacity. The statute seems to be imperative in this respect.

2. Where the question of the insanity of a defendant at the time of the execution of a note and mortgage is properly presented by the pleadings and by affidavit, the better practice is to submit that issue to a jury, if the chancellor is asked so to do. But under the statute, (Rev. Stat. chap. 22, sec. 40,) the duty of the court to submit such issue to a jury is discretionary, and not imperative.

3. **SAME—recitals in decree—how far conclusive.** Where a decree in a case which was referred to the master to take and report the evidence, recites that the cause was heard on the bill, answers, replication, and also the proof taken and reported by the master, such recital can not be contradicted or overcome by the clerk's certificate that there is no report of the master on the files.

4. And where a decree recites the hearing of testimony in open court, and finds, from the evidence, the facts necessary to support the decree rendered, in the absence of a certificate of the evidence heard it will be presumed that there was sufficient evidence to warrant and sustain such finding.

5. **SAME—relief under the general prayer.** A bill to foreclose a mortgage before due, by its terms, averred the failure of the mortgagor to pay the taxes then due on the land, as one of the grounds for electing to hold the whole debt due. The bill set out the mortgage as a part thereof, and it showed a right to declare the whole debt due for a failure to pay interest, or taxes on the premises: *Held*, that this was sufficient, under the general prayer for relief, to authorize a decree for the taxes paid by the mortgagee *pendente lite*, to protect the title to the mortgaged premises.

6. So where a mortgage provides that in case of foreclosure, and sale of the mortgaged premises, the mortgagee shall be paid out of the proceeds of the sale the expense of advertising, etc., together with moneys advanced for taxes, assessments and other liens, etc., and the mortgagee pays such taxes subsequently to the filing of his bill to foreclose, in

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Statement of the case.

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which the duty of the mortgagor to pay the taxes, and his failure to do so, are alleged, the complainant may be allowed, by decree, the amount of such advance, under the general prayer for relief, without filing a supplemental bill.

7. **ASSIGNMENT OF ERROR—*by whom.*** One party can not assign error for another who makes no complaint. So on bill to foreclose a mortgage, the mortgagor can not assign for error a decree by default against a tenant, taken upon an insufficient service of such tenant, who failed to join in the writ of error.

8. If, however, the co-defendant has a joint interest with those complaining, the rule is different, for in such case a defendant has a right to insist upon a decree which settles the rights of all the parties concerned.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Scott county; the Hon. CYRUS EPLER, Judge, presiding.

April 6, 1883, James Brown and wife, Margaret, executed a note to defendants in error for \$13,500, due in five years, with seven per cent interest, payable annually, and a mortgage to secure the same. The mortgage provided, that on default of the mortgagors to pay the annual interest, or to pay the taxes assessed on the land, the whole debt might be declared due, at the option of the holder, and out of the proceeds of sale, on foreclosure of the mortgage, there be paid, first, the expense of advertising, selling and conveying the mortgaged premises, together with \$100 solicitor's fees, and all moneys advanced for taxes, assessments and other liens, and then the principal of the note, whether due or not, together with the interest accrued thereon. On April 15, 1884, defendants in error filed their bill to foreclose said mortgage, averring a failure to pay the annual interest before then due, and the taxes for the year 1883, and that for that reason they had elected to declare the whole of the debt evidenced by said note due. The bill prayed that an account be taken of the sum due, and a decree be entered for its payment by a short day, with \$100 solicitor's fees, and in default thereof, for foreclosure

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Statement of the case.

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and sale. All the defendants were defaulted except James and Margaret Brown, the plaintiffs in error, who appeared, and the latter filed an affidavit, to the effect that the said James Brown, before and at the time of the execution of the note and mortgage, was, and still is, *non compos mentis*, and asking for the appointment of a guardian *ad litem* for him, which was done. She also answered, under oath, admitting the execution of a note and mortgage, but averring that the consideration thereof was mainly indebtedness due complainant from the firm of August & Brown, of which her husband had been a member; that upon its dissolution, its books of account, by agreement of complainant and said firm, were left with said August for settlement and collection; that said August collected money enough out of the assets of said firm to liquidate said indebtedness to complainants, and which was deposited in the bank of complainants to be credited on such indebtedness, but that complainants, in violation of their agreement, and without the knowledge of Brown, permitted August to withdraw it for other uses, and that the residue of said consideration was money loaned by complainants to said Brown with notice of his mental incapacity, etc. The guardian *ad litem* also answered, requiring strict proof. Replication was filed, and the transcript of the record shows, beside the papers mentioned, and the process, and the terms thereof, only the final decree, entered in the cause November 21, 1884, which purports to have been made on a hearing upon the pleadings and "the proofs taken and reported by the master in chancery," and "testimony heard in open court."

The decree recites the default of the other defendants, the appointment of a guardian *ad litem* for James Brown, the entry of a rule to answer, and an order that "on notice of filing such answer and replication thereto, the cause stands referred to the master to take proof;" that the court found the allegations of the bill to be true, and, among other things, that the taxes on the mortgaged premises for the year 1883 were past due

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Brief for the Plaintiffs in Error.

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before the filing of the bill; that the mortgagors had neglected to pay the same; that complainants had paid the taxes on said premises,—\$182.05; that defendant James M. Brown is in possession of a portion of said premises as tenant of Ellen and Margaret Brown, who are also defendants, under a lease which will expire March 1, 1885; that at the time of the execution of said note and mortgage, the defendant James Brown was of sound mind, and qualified to transact business; and that the amount due on the note, after deducting payments and credits, was \$12,636.98. The decree, after such finding, required the mortgagors to pay that sum, with six per cent interest, within twenty days of the date of such decree, together with \$182.05 for taxes advanced by complainants, with costs, in which should be included \$100 for solicitor's fees, and in default thereof, ordering a sale in the usual form.

The defendants, James and Margaret Brown, prosecuted a writ of error from the Appellate Court for the Third District, to reverse this decree, and assigned errors in that court. The Appellate Court affirmed the decree, and the same defendants below prosecute this writ of error.

Messrs. CALLON & THOMPSON, for the plaintiffs in error:

The record fails to show that the master ever made any report of the evidence. If it be claimed that the recitals in the decree are conclusive on this point, we say they would be were they not squarely contradicted by the whole record. *Hards v. Burton*, 79 Ill. 504; *Wilhite v. Pearce*, 47 id. 413; *Boston v. Nichols*, id. 353; 2 Daniell's Ch. (3d ed.) p. 1308.

The bill nowhere alleges that defendants in error paid any taxes on the lands, nor does it pray any relief on that question. On the contrary, it alleges "that said taxes were then wholly unpaid," and only prays for the amount due on the note and mortgage, and the solicitor's fee of \$100. The findings of the court follow the allegations in the bill. The court expressly finds that all the taxes for 1883 "still remain due and wholly

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Brief for the Defendants in Error.

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unpaid." Now, upon the allegations in the bill and the express findings of the court, how was it possible to find, in the same breath, as it were, "that complainants had paid as taxes on said premises the sum of \$182.55?" This is the first intimation, in any of the pleadings or proceedings in this case, of any claim for taxes paid. When were they paid? Not before the bill was filed, for it expressly alleges that said taxes had then long been due, and were then "wholly unpaid." They could not have been paid when the cause began to be heard, because the court expressly finds that they "still remain due and unpaid." If they were paid, it must have been after that finding. Clearly, if defendants in error did pay any taxes after filing their bill, they should have set up the fact in a supplemental bill. This they did not do. We submit that it was palpable error to grant relief not prayed for in the bill, nor justified by the allegations in the bill. The general prayer does not cure the error, in the absence of appropriate allegations. "The decree must conform to the prayer of the bill." *Hall v. Towne*, 45 Ill. 493; *Ward v. Enders*, 29 id. 519; *De Leuw v. Neely*, 71 id. 473; *Dodge v. Wright*, 48 id. 382; *Gunnell v. Cockerill*, 84 id. 319; *Kellogg v. Moore*, 97 id. 282; *Parkhurst v. Race*, 100 id. 558.

The issue as to the insanity of James Brown should have been tried by a jury. *Myatt v. Walker*, 44 Ill. 485; *Panky v. Raum*, 51 id. 88; *Hahn v. Huber*, 83 id. 243.

The service of summons on James M. Brown was not in compliance with the statute, as appears by the return, and no default could properly be taken against him. The return is: "I have duly served the within named James M. Brown, etc., by leaving a true copy thereof," etc. *Cost v. Rose*, 17 Ill. 276.

Mr. J. M. RIGGS, Mr. J. A. WARREN, and Mr. T. H. DEVINE, for the defendants in error:

James M. Brown not having joined in prosecuting the writ, no error can be assigned on his behalf, nor can plaintiffs in

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Brief for the Defendants in Error.

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error assign for error any action of the chancellor not injuriously affecting their interests. *Kennedy v. Kennedy*, 66 Ill. 196; *Havighorst v. Lindberg*, 67 id. 463; *Smith v. Hickman*, 68 id. 315; *Clark v. Marfield*, 77 id. 262; *Richards v. Greene*, 78 id. 527.

The mortgage set out in full in the original bill provides for payment of taxes out of the proceeds of the mortgaged property. The bill alleges the taxes were wholly unpaid. There was a prayer for general relief, under which the relief as to taxes might be properly granted. *DeLeuw v. Neely*, 71 Ill. 473.

This is an ordinary cause in chancery for foreclosure of a mortgage, in which it is in the discretion of the chancellor to take the verdict of the jury, or not. Rev. Stat. 1885, Chancery Practice, sec. 40; *Meeker v. Meeker*, 75 Ill. 267; *Long v. Long*, 107 id. 211.

The only exception to this rule of discretion, in ordinary chancery cases, is in the case of an heir-at-law, a rector, or a vicar. Daniell's Ch. Pr. (ed. of 1871,) p. 1075.

The verdict of a jury should only be taken where the evidence is voluminous, the facts complicated, and the question doubtful. *Milk v. Moore*, 39 Ill. 588; *Dowden v. Wilson*, 71 id. 486; *Fanning v. Russell*, 94 id. 390.

The chancellor having recited in the decree that the master had taken and reported the testimony, and that report not appearing on the files, it will be deemed to have been lost. *Hess v. Voss*, 52 Ill. 477.

Where the evidence in a chancery cause is not otherwise preserved, the recitals and findings in the decree are conclusive as to the facts. *Sheen v. Hogan*, 86 Ill. 19; *McIntosh v. Saunders*, 68 id. 130; *Morgan v. Corlies*, 81 id. 75; *Davis v. Christian Union*, 100 id. 318; *Groenendyke v. Coffeen*, 109 id. 334; *Hannas v. Hannas*, 110 id. 64.

If plaintiffs in error desired to question the recitals or finding of facts in the decree, it was their duty to cause all the

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Opinion of the Court.

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evidence to be preserved. *McIntosh v. Saunders*, 68 Ill. 130; *Morgan v. Corlies*, 81 id. 75; *Groenendyke v. Coffeen*, 109 id. 334.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

It is well settled that one party can not assign error for another who makes no complaint. The two mortgagors were properly served in the suit to foreclose the mortgage, and appeared therein. James M. Brown, it appears, was a tenant of the premises, only, whose term had substantially expired. If it was conceded that the service upon him was insufficient to give the court jurisdiction of his person, and that it was therefore error to enter a decree *pro confesso* as to him, he alone could avail of that error. If he had a joint interest with the plaintiffs in error, the rule would be different, for in such case a defendant has the right to insist upon a decree which settles the rights of all the parties concerned. (See *Enos v. Capps*, 12 Ill. 257.) It is therefore not necessary to determine whether there was proper service on James M. Brown or not. He is content with the decree rendered, and any error as to him will in no manner injuriously affect plaintiffs in error here. *Clark v. Marfield*, 77 Ill. 262; *Hannas v. Hannas*, 110 id. 53; *Havighorst v. Lindberg*, 67 id. 468; *Kennedy v. Kennedy*, 66 id. 196; *Smith v. Hickman*, 68 id. 314; *Richards v. Greene*, 78 id. 527.

Nor do we think there was error in the failure of the court to send an issue as to the mental capacity of James Brown, one of the mortgagors, to be tried by a jury. It does not appear that the court was requested to direct the issue to be thus tried. The English chancery practice made the reference of an issue of fact to a jury imperative only in cases of an heir-at-law, a rector or a vicar. (Daniell's Ch. Pr. 1075.) The statutes of this State require the submission to a jury of an issue arising upon the contest of a will on the ground of insanity of the testator, or of his want of mental capacity. The

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Opinion of the Court.

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statute seems to be imperative in this respect. Rev. Stat. chap. 148, sec. 7; *Meeker v. Meeker*, 75 Ill. 260; *Long v. Long*, 107 id. 211.

In *Myatt et al. v. Walker et al.* 44 Ill. 485, this court said: "We have carefully examined the testimony in the record. We find it voluminous, doubtful in some respects, and largely conflicting. When, however, taken altogether, we think it fails to sustain the decree. In the absence of all knowledge of the manner of the witnesses in giving their testimony, we feel some doubt as to where the true weight of evidence really lies. In such cases it is eminently proper that an issue should be framed, and tried by a jury. Such a practice has always been fully sanctioned, and we think it more satisfactory, and better calculated to promote justice, and the practice should be adopted by the court below in all cases involving questions of insanity." In *Hahn v. Huber et al.* 83 Ill. 244, this court held, that on a bill to foreclose a mortgage, a motion to submit the question of the insanity of a mortgagor to a jury, without any affidavit of the fact of his insanity, was properly overruled.

It would seem from the two cases cited, where the question of insanity of the defendant is properly presented by the pleadings and by affidavit, that the better practice is to submit the question of sanity to a jury. It by no means follows, however, that the court is bound, upon its own motion, to submit such an issue, or that it is error not to make such submission. The statute (sec. 40, chap. 22,) provides, that "the court may, in its discretion, direct an issue or issues to be tried by a jury, whenever it shall be judged necessary, in any cause in equity pending therein." The implication necessarily is, that the submission of the question of fact to a jury, in chancery causes, where not otherwise provided, is left to the sound discretion of the chancellor. In all cases where, by the course of the chancery practice or by the statute, the issue is required to be submitted to a jury as a matter of course, no such discretion exists. It is, however, evident, that plaintiffs in error are in

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Opinion of the Court.

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no condition to complain of any ruling of the trial court in this respect. That court was not called upon to make a ruling, nor was the question presented for its consideration. To have raised the question they should have made the motion for the submission of the issue in apt time in the trial court. But, as we have said, the duty of the court to submit an issue to be tried by a jury, was, in the case under consideration, discretionary, not imperative. See *Milk et al. v. Moore*, 39 Ill. 584; *Dowden et al. v. Wilson*, 71 id. 485; *Fanning et al. v. Russell et al.* 94 id. 386.

It is next claimed, that the cause was referred to the master to take and report the evidence, and that a decree was entered without any report having been made by the master. The decree, as set forth in the transcript, recites that the cause was heard on the bill, answers, replication, and "also the proof taken and reported by the master in chancery of this court, and testimony heard in open court." This recital in the decree can not be contradicted or overcome by the clerk's certificate that there is no report of the master on the files. The decree recites that James Brown was of sound mind when he executed the note and mortgage, and finds that fact, together with other facts on which it is based. The facts thus found in the decree justify its rendition. In the absence of a bill of exceptions or certificate of evidence, it will be presumed that the findings were warranted by the proofs heard by the court. In the absence of a certificate preserving *all* the evidence heard by the trial court, it must be presumed that there was sufficient evidence to warrant and sustain the finding. *Hannas v. Hannas*, *supra*; *Groenendyke v. Coffeen*, 109 Ill. 334; *Sheen v. Hogan*, 86 id. 16; *Davis v. American and Foreign Christian Union*, 100 id. 313; *Morgan v. Corlies*, 81 id. 72; *McIntosh v. Saunders*, 68 id. 128; *Rhoades v. Rhoades*, 88 id. 139; *Walker v. Cary*, 53 id. 470; *Allen v. Le Moyne*, 102 id. 25; *Mauck v. Mauck*, 54 id. 281; *Walker v. Abt*, 83 id. 226; *Corbus v. Teed*, 69 id. 205.

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Opinion of the Court.

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It is urged that the court erred in allowing, by its decree, the taxes advanced by complainants, because, as it is said, no foundation was laid therefor in the allegations or prayer of the bill. It is unquestionably true that the decree must be in conformity with and supported by the allegations and prayer of the bill. It is shown that when the bill was filed, complainants had not paid the taxes, although it was averred that the taxes were past due and unpaid by the defendants, and that was made, as it is alleged, one of the grounds for electing to declare the whole sum evidenced by the note to be due. Complainants not having then paid the taxes, it would follow, that there would be no prayer for their recovery by them. However, the bill sets out the mortgage as a part thereof, and alleges, that under its provisions the taxes were to be paid by the defendants, and their default in that regard. This we think was sufficient, under the general prayer for relief, to authorize the entry of a decree for the taxes paid by the mortgagees *pendente lite*, to protect the title to the property mortgaged.

Where a mortgage provides, that in case of foreclosure and sale of the mortgaged premises the mortgagees shall be paid out of the proceeds of the sale the expense of advertising, etc., together with moneys advanced for taxes, assessments, and other liens, etc., and the mortgagee pays such taxes subsequently to the filing of his bill to foreclose, in which the duty of the mortgagor to pay the taxes, and his failure to do so, are alleged, the complainant may be allowed, by decree, the amount of such advances, under the general prayer for relief, and without filing a supplemental bill.

Finding no substantial error of which the plaintiffs in error can complain, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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Syllabus. Brief for the Appellant.

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THE PEOPLE *ex rel.* J. W. Davidson, Treasurer,

v.

L. B. COLE *et al.*

*Filed at Springfield April 5, 1889.*

1. DRAINAGE LAW—*omitting lands from assessment.* At the time of the organization of a drainage district under the act of 1879, an assessment of nearly \$5000 was levied on the lands of the district. After the act was amended in 1885, the commissioners made a new classification of the lands under section 21 of the amendatory act, and levied a new assessment of \$5000, and also an additional assessment of \$2000, to be paid in two installments. At the time of making this levy, the commissioners credited certain lands with the full amount levied against them, so as to relieve them entirely from the levy, on the ground they were not benefited: *Held*, that this was the same as to wholly omit to assess the lands so credited, and that such action rendered the whole assessment void.

2. Drainage commissioners have no power to release lands within the district of their proportion of the assessment based on the last classification. Both the letter and spirit of the statute require that the burdens of the district shall be apportioned on the basis of a classification of lands in the district, which each owner had an opportunity to contest.

3. SAME—*re-classification of lands—notice to owner.* Upon every classification of lands in a drainage district each land owner has an interest, and in order that he may be protected in that interest, he is entitled to notice of the "time when and the place where" the commissioners will meet to hear any and all objections that may be made to the classification, and if dissatisfied with the decision of the commissioners, he is given an appeal to three supervisors.

APPEAL from the County Court of Champaign county; the Hon. JAMES W. LANGLEY, Judge, presiding.

Mr. T. J. ROTH, and Messrs. RAY & SLAUSON, for the appellant:

Appellees, by their appearance in the county court and going to trial on the merits of the objections filed, admitted the *prima facie* right of appellant to recover judgment against their lands. *Mix v. People*, 106 Ill. 425.

It devolves upon the objectors to show that it is substantially unjust that judgment should be rendered against their

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Brief for the Appellees.

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lands for these assessments. The burden is upon them to show wherein the injustice of the claim for judgment in this application consists. Starr & Curtis' Stat. chap. 120, sec. 191, p. 2087; *Chiniquy v. People*, 78 Ill. 570.

Unless the court finds that the tax itself is substantially unjust, the objections can not prevail. Revenue act, sec. 191.

As to the duty and right of the commissioners, in making this assessment, to consider their former assessments against the lands of the district with reference to benefits, and to give credits for amounts which were in excess of benefits, the law is thought to be clear. Const. art. 4, sec. 31; Drainage act of 1885, sec. 26; *Commissioners v. Kelsey*, 120 Ill. 482.

The recording of the resolution in the drainage record, and the filing of the tax list with the town clerk, is notice to all the tax-payers within the district, of the intended levy. The law requires no more than this. Drainage act of 1885, sec. 26.

Mr. FRANCIS M. WRIGHT, and Mr. L. A. SMYRES, for the appellees:

No special assessment can be made except through and by a classification, and when a levy is made, the statute is imperative that it shall be apportioned among the several tracts according to the acreage of each, and its figure of classification on the graduated scale. The commissioners have no power to apportion a levy on any other basis. Drainage act of 1885, sec. 26, p. 86.

This was not done, as the assessment was nullified by a fictitious credit of the same amount as regards part of the land. If the commissioners have this power in one case, they have it in all, which would render the classification of no binding force in any case.

In no other way than by following the provisions of the statute can the commissioners make an assessment, and no assessment can be made under the statute without a classification, a notice, and a tax-list in conformity with the classi-

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Opinion of the Court.

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fication. All of these are wanting in this case, therefore in the judgment of the county court there is no error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Drainage district No. 3, in the town of Rantoul, in Champaign county, was organized in 1882, under the Drainage act of July 1, 1879, which was then in force. At the time of organization, an assessment of \$4854 was levied upon the lands in the district. The Drainage act of July 1, 1879, was amended and revised by the Drainage act in force July 1, 1885, and, after the last named act was in force, on the 23d of November, 1885, the drainage commissioners made a new classification of the lands in the district, pursuant to the authority conferred in that respect by the 21st section of the last named act. After this classification, and on the 21st of December, 1885, the commissioners levied a new assessment of \$5000 upon the lands in the district, and on the 23d of November, 1887, the commissioners levied an additional assessment of \$2000 upon the lands in the district, which was to be paid in two installments. At the time of making this levy, the commissioners credited certain lands with the full amount levied against them, for the purpose of relieving them entirely from the payment of any and every part of that levy. Appellees, among other land owners, not having paid the amounts assessed against their lands by the last named levy, application was made for judgment, of the county court of Champaign county, for such amounts. Appellees appeared and filed numerous objections, among which was the following:

"Sixth—The pretended credits by which certain lands in said district are totally relieved of all burdens of taxation in and by said tax list, was intended by the commissioners to burden the lands of the objectors beyond their just proportion, and is therefore, in law, a fraud, rendering said tax list a nullity. Objectors had no notice of levy of \$2000, or of tax list, or the filing thereof, and therefore could not prosecute appeal.

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Opinion of the Court.

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Wherefore tax list is not binding, etc., and may be attacked collaterally," etc.

The court sustained the objection, and declined to give judgment in behalf of the district, as prayed, and this appeal is prosecuted to reverse that ruling.

If this record presented merely the question whether the fact that one person had not been assessed who ought to have been assessed, or that one person had failed to pay the amount assessed against his property, afforded a reason why others who were assessed should not pay the amounts assessed against their property, it may be that we should feel compelled to reverse the judgment below. But no such question is presented, and it is therefore immaterial how we might decide that question. The testimony of the commissioners is: "The credits entered upon the tax lists to the credit of all the lands where credits are given, as appears in said tax lists, were made, and each of them, at the time, and as a part of the same act and transaction as the assessment of lands in said tax lists. The credits so given do not represent any damages, or old ditch, or right of way, or any other thing of value received from the land owner or on the land so credited, but were entered up to said lands for the reason that we believed said lands so credited were not benefited. The lands so credited were assessed upon the figure of classification as heretofore made, and at the same time the credits were entered, for the purpose of relieving them of said assessment."

It is too obvious to need discussion, that the levying of an amount, and in the same instant, and as a part of the same act, giving credit for it as a mere gratuity, is precisely the same as not levying it, for the amount that will thus be left to be collected from other property in the district must be precisely the same in the one case as in the other. It is the substantive right, and not the mere matter of form, that must be considered. The question presented, therefore, is, whether the commissioners can levy an assessment upon a part, only, of

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Opinion of the Court.

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the lands in the district, in disregard of their former assessment of benefits and classification, merely because they may, at the time of the levy, be of the opinion that the lands omitted from the levy are, in fact, not benefited.

It is, among other things, provided in section 21 of the act in force July 1, 1885, that "in districts heretofore formed, which have made one or more levy of taxes, and a new levy is required, \* \* \* if the commissioners believe, from experience and results, that the former assessment was not fairly adjusted on the several tracts of land according to benefits, then the commissioners shall disregard the proportion of the former assessment, and make the new classification in accordance with such proportions as should have been made originally." In every classification of lands in the district it is apparent that each land owner has a vital interest, and in order that he may have an opportunity to protect that interest, the 23d section of the act in force July 1, 1887, provides that he shall have notice of the "time when and the place where" the commissioners "will meet to hear any and all objections that may be made to the classification." The 24th section requires that the commissioners "shall hear whatever objections may be urged by any person interested, and if satisfied that any injustice has been done in the classification of the several tracts of land, or any of them, they shall correct the same in accordance with what is right." And "any person appearing and urging objections, who is not satisfied with the decision of the commissioners, may appeal from their decision to three supervisors."

We must therefore assume that the classification of November, 1885, was correct, and that it was satisfactory to all the parties affected by it. It might undoubtedly happen, that by reason of changes in conditions, what in 1885 appeared to be a benefit may now be demonstrated to be not a benefit; but it is manifest that this is not a question in which a few, only, of the land owners of the district are interested, but that it affects every land owner, for a given amount having to be raised, just

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Syllabus.

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in proportion as lands are released from the obligation of its payment must the amount be increased on those that are not released.

No provision of the law authorizing commissioners to release lands within the district from the payment of their proportion of the assessment, based on the last classification, is pointed out or claimed to exist, and it is clear the existence of such a power would practically nullify the provisions of the statute to which we have referred, for of what avail can it be to a party that he is allowed to contest a classification, if the commissioners may, at their pleasure, disregard such classification? Both the letter and the spirit of this statute clearly require that the burdens of the district shall be apportioned on the basis of a classification of lands in the district, which each land owner had an opportunity to contest. An assessment, then, levied, as was this, in violation of the act under which, alone, it is assumed to be authorized, is void, and can not be collected. *City of Nashville v. Weiser et al.* 54 Ill. 245; *Dillon on Mun. Corp.* (1st ed.) sec. 610, and authorities cited in note 1.

The judgment is affirmed.

*Judgment affirmed.*

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THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

BLANCHE LATIMER, a minor.

*Filed at Springfield April 5, 1869.*

1. **BOND FOR COSTS**—*in suit in behalf of minor—at what stage of the suit it may be filed.* An action brought by the next friend of an infant without an order of appointment or the filing of a bond for costs, will not be dismissed, if such bond be given when so ordered by the court. The giving of the bond for costs is not a jurisdictional matter.

128	163
35a	343
128	163
142	87
148	621
128	163
128	163
151	286
128	163
174	27
73a	521
128	163
84a	170
128	163
174	27
73a	521
128	163
84a	170
128	163
184	504
185	405
128	163
91a	483
128	163
e188	1585

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Syllabus.

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128	163
190	" 72
f190	" 130
190	" 360
128	168
208	" 617
110a	" 487

2. RAILROADS—removing passenger for non-payment of fare—circumstances to be considered—what is a regular station. In an action of trespass by a girl of about six years of age, against a railway company, for putting her off the train at a point about half a mile from its depot, but within the same town, for non-payment of fare, there is no error in allowing the plaintiff to prove that there was an extra train following the one from which the expulsion was made. The fact that in a few minutes a train was expected to arrive at the place of expulsion, is a circumstance proper to be considered by the jury in connection with all the other facts upon the question whether it was proper or improper for the conductor to put the plaintiff off at that particular point.

3. The regular stations on a railway at which the conductor is authorized, by section 94, chapter 114, to remove, or cause to be removed, a passenger for a refusal to pay fare, are the places on the railway where passenger trains usually stop for the purpose of having passengers get on and off such trains. The statute does not authorize the expulsion of a passenger for non-payment of fare at any place in the town or village in which the company may have its passenger depot building, other than at such depot platform.

4. EVIDENCE—opinions of experts. In a suit by a child six years old, against a railway company, to recover for injury sustained by ejecting her from a train, the plaintiff endeavored to prove that she was suffering from heart disease, produced by the fright she received when put off the train, and asked physicians whether fright would produce the heart trouble: *Held*, that the question was proper.

5. PLEADING—joinder of counts—as to acts done by the principal, and by an agent. In trespass by a passenger against a railway company, for expulsion from a train at a place not a regular station, for non-payment of fare, the first count charged that the trespass was committed by the defendant corporation, while the second averred that the defendant, by its conductor, committed the trespass: *Held*, no misjoinder of counts, as they both charge a trespass by the defendant.

6. ASSIGNMENT OF ERROR—as to instructions requested on a given question. Where both parties ask the court to instruct the jury on the question of exemplary damages, and thereby concede that such question is involved, neither can be heard to assign for error the fact that the court complied with his request. A party can not demand of the court that it rule upon a certain branch of the case, and then be heard to say that the court had no right to rule upon that branch of the case at all.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of DeWitt county; the Hon. CYRUS EPLER, Judge, presiding.

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Brief for the Appellant.

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Messrs. MOORE & WARNER, for the appellant:

The suit having been brought by the next friend without any previous authority or appointment by the court, and without entering into bond for costs, and filing the same in court before or at the time of commencing the suit, it should have been dismissed on plaintiff's motion. Rev. Stat. chap. 64, sec. 18, as amended by Laws of 1881, p. 98.

The first count of the declaration charging the appellant with one offense, and the second count charging one Finch with the same or another offense, there is a misjoinder of counts, and the court erred in refusing to carry appellee's demurrer back to the declaration. Chitty's Pl. 205; *Mining and Transportation Co. v. Ullman*, 89 Ill. 244.

The court erroneously allowed appellee to propound improper questions, that were objected to by appellant, to the witnesses introduced as experts, and allowed such witnesses to give improper answers thereto. 1 Greenleaf on Evidence, sec. 585; *Henry v. Hall*, 13 Bradw. 343; *Railroad Co. v. Railroad Co.* 67 Ill. 142; *Hoerner v. Koch*, 84 id. 408; *Railway Co. v. Shires*, 108 id. 617.

An instruction should not assume as a fact anything material to the issue. *Railroad Co. v. Zang*, 10 Bradw. 594; *Railroad Co. v. Hall*, 90 Ill. 43; *Railroad Co. v. Shelton*, 66 id. 424; *Morey v. Pierce*, 14 Bradw. 91; *Bradley v. Coolbaugh*, 91 Ill. 148; *Village of Warren v. Wright*, 3 Bradw. 602; *Wharton v. People*, 8 id. 232.

The court should not, in its instructions, intimate as to the weight of the evidence, or call attention to particular testimony that is not decisive of the case. *Frame v. Badger*, 79 Ill. 441; *Graves v. Colwell*, 90 id. 612; *Railroad Co. v. Hall*, id. 42; *Life Ins. Co. v. Dill*, 91 id. 174; *Coon v. People*, 99 id. 368; *Railway Co. v. Morunda*, 108 id. 576.

The evidence in the case did not warrant the court in instructing the jury, for appellee, that they might find exemplary or vindictive damages. *Railroad Co. v. Patterson*, 63 Ill. 304;

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Brief for the Appellee.

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*Pierce v. Millay*, 44 id. 189; *Railroad Co. v. Dewin*, 86 id. 296; *Railroad Co. v. Dunn*, 52 id. 451; *Railroad Co. v. Boger*, 1 Bradw. 472; *Waldron v. Marcier*, 82 Ill. 550.

An instruction which fails to tell the jury that they should be governed by the evidence in their assessment of damages, is erroneous. *Railway Co. v. Frazier*, 19 Bradw. 92; *Martin v. Johnson*, 89 Ill. 537; *Railroad Co. v. Sykes*, 96 id. 162; *Rolling Mill Co. v. Morrissey*, 111 id. 646.

The damages are excessive. *Railroad Co. v. Dunn*, 52 Ill. 451; *Railroad Co. v. Payzant*, 87 id. 125; *Railroad Co. v. Cunningham*, 67 id. 316.

Mr. R. A. LEMON, for the appellee:

The court properly refused to dismiss the suit for a failure to file bond before suit brought, and in allowing one to be filed after the motion. Starr & Curtis' Stat. p. 1241, sec. 18; *Patterson v. Pullman*, 104 Ill. 87; *Lee v. Waller*, 13 Bradw. 403; *Baker v. Palmer*, 83 Ill. 570.

Appellant, by pleading to the declaration, waived all previous questions on the demurrer, (*Brooks v. People*, 11 Bradw. 422, *Quincy Coal Co. v. Hood*, 77 Ill. 68,) and no motion in arrest of judgment was made.

A general objection to a question only raises the question whether or not the subject matter of the inquiry is proper or relevant, and does not go to the form of the question. In all cases where the cause of the objection can be removed or obviated, our practice requires that the objection be specific. *Wilson v. King*, 83 Ill. 232; *King v. Railroad Co.* 98 id. 376; *Railroad Co. v. Morgan*, 69 id. 492; *Chicago v. Stearns*, 105 id. 554.

The court submitted the question of exemplary damages at the special request of both parties.

In actions for torts, the damages for which can not be measured by a legal standard, all the facts constituting and accompanying the wrong should be proved; and though there be a

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Opinion of the Court.

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legal standard for the principal wrong, if aggravations exist they may be proved to enhance damages, and every case of personal tort must necessarily go to the jury on its special facts. These embrace the *res gestæ*, and the age, sex and *status* of the parties,—and this whether the case be one for compensation, only, or also for exemplary damages, where they are allowed. 1 Sutherland on Damages, p. 745.

A regular station means a regular station for passengers to get on and off the train. *Railroad Co. v. Flagg*, 43 Ill. 364; *Railroad Co. v. Parks*, 18 id. 465; *Railroad Co. v. Vanatta*, 21 id. 188.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is an action of trespass, brought in the Circuit Court of De Witt County, on June 28, 1887, by the appellee, a girl six years old, who sues by her mother and next friend, against the appellant Company, to recover damages for the removal of appellee, at a place other than a regular station, from a passenger train of cars operated by appellant between Wapella and Clinton in said county, while the appellee was riding thereon as a passenger. The verdict and judgment in the Circuit Court were in favor of the plaintiff, and such judgment, having been affirmed by the Appellate Court, is brought here by appeal from the latter court. All the questions of fact are settled by the judgment of the Appellate Court.

First, it is assigned as error, that the Circuit Court refused to dismiss the suit, upon motion of defendant below, because it was brought by a next friend without previous authority or appointment by the court, and without filing a bond for costs before or at the time the suit was commenced. When the motion to dismiss was overruled, a cross-motion by the plaintiff below for leave to file a bond for costs was allowed, and the plaintiff, in obedience to a rule by the court, filed the bond on the same day. The error is not well assigned.

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Opinion of the Court.

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Section 18 of chapter 64 of the Revised Statutes, being "An Act in regard to guardians and wards," (Starr & Cur. Stat. page 1242) contains a proviso to the effect "that any suit may be commenced and prosecuted by any minor by his next friend, without any previous authority or appointment by the court, *on* such next friend entering into bond for costs, and filing the same in the court in which such suit is instituted." The proviso must be construed in connection with the part of the section, which precedes it. The preceding portion of the section directs, that "nothing contained in this act shall impair or affect the power of any court \* \* \* to appoint or allow any person as next friend for a minor to *commence, prosecute* or *defend* any suit in his behalf." The power is here conferred to appoint a next friend to "prosecute" the suit, as well as to "commence" it. The prosecution is designated as being distinct from the commencement of the suit. It follows that a next friend might be appointed to prosecute after the suit was commenced. This must be kept in mind in determining the meaning of the language used in the proviso. The words of the latter must be taken to mean, that without previous authority to "prosecute," as well as in the absence of previous authority to "commence," the suit may be "prosecuted" as well as "commenced" by filing a bond for costs. On entering into the bond and filing it in court at any time during the prosecution of the suit when the court shall so order, the suit may proceed. The filing of the bond is a substitute for the previous appointment, whether it be an appointment to prosecute, or to commence the suit. The design of the statute in conferring upon the court the power to appoint a next friend was to insure the conduct of the suit by a responsible person. This end can be gained by the filing of a good bond for costs, whether it be done at the beginning of the suit, or after the suit has been begun. We do not agree with counsel in the view advanced by them, that the filing of the bond is a "pre-requisite and jurisdictional necessity." (*Baker v. Palmer*, 83 Ill. 568.)

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Opinion of the Court.

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*Second*, it is assigned for error that certain questions, asked of some of the witnesses, were improper, and that certain testimony, which was admitted, should have been excluded. We can not stop to notice all of the objections, made by counsel for defendant upon the trial below. Many of these objections are extremely technical, but they arrange themselves mainly under two general heads. In the first place, objection is made to testimony, introduced by the plaintiff for the purpose of showing, that an extra train was following the train, from which plaintiff was ejected, and was expected to reach and, as matter of fact, did reach the point, at which she was put off, in about fifteen or twenty minutes after her removal. The evidence tends to show, that the appellee was placed upon the train by her uncle, in the afternoon of June 14, 1887, at Wapella, for the purpose of being carried from Wapella to her home in Clinton, distant about four and a half miles; that the conductor found her in one of the cars with a paper hatbox in her hands, and asked for her fare, which amounted to about seven cents; that the child had no money with which to pay her fare; that the conductor then stopped the train at a point within the corporate limits of Wapella, but about a half of a mile south of the passenger depot, and there put the little girl off with her box; that she ran back towards the depot, crying as she went, and being obliged to pass a cattle guard and culvert on her way.

Counsel for appellant admit that railroad companies are not allowed to put off even adult passengers "at out-of-the-way places and at a distance from possible aid, food and shelter." They claimed on the trial below, and are claiming here, that the conductor had as much right to put appellee off the train at any point within the corporate limits, as at the platform of the depot. The character and location of the place, where the removal took place, and all the circumstances attending the act of removal, were matters about which both sides introduced testimony. The fact, that in a few moments a train was ex-

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Opinion of the Court.

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pected to arrive at the place of removal, was a circumstance proper to be considered by the jury, in connection with all the other facts in the case, as bearing upon the question whether it was proper or improper for the conductor to make the removal at that particular point.

In the next place, the plaintiff endeavored to show that she was suffering from functional disease of the heart, produced by the fright she suffered when ejected from the train. Upon this branch of the case physicians were placed upon the stand as expert witnesses. Appellant objects, that certain questions, addressed to the medical witnesses, required them to express their opinions upon the evidence, and that they were thereby made to usurp the function of the jury in deciding whether or not the affection of the heart was produced by the act of ejection from the train. In other words, it is claimed, that the questions objected to are such as were condemned by this court in *C. & A. R. R. Co. v. S. & N. W. R. R. Co.* 67 Ill. 142, and *Hoener v. Koch*, 84 id. 408. In the first case, a witness was asked, what would be the damages to the defendant, if certain work was done? In the second, a witness was asked, whether, taking the facts as he understood them, he saw any evidence of malpractice?

No such interrogatories, as those commented upon in the cases cited, were addressed to the witnesses in the case at bar. The physicians, who were examined on the trial below, were asked whether fright would produce the heart trouble, with which appellee was said to be afflicted. It was proper for them to give their professional opinion upon this subject.

Third, the giving and refusal of instructions are objected to mainly upon two grounds. The first relates to the definition of "regular station." Section 94 of chapter 114 of the Revised Statutes (Starr & Cur. Stat. page 1944) contains these words: "If any passenger on any railroad car \* \* \* shall refuse, upon reasonable demand, to pay his lawful fare, etc., \* \* \* it shall be lawful for the conductor of the train to remove, or

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Opinion of the Court.

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cause to be removed such passenger from the train at any regular station." The instructions given for the plaintiff defined the term, "regular station," to mean "the place on the railroad where passenger trains usually stop for the purpose of having passengers get on and off such trains," while several instructions, asked by defendant and refused, defined such term to mean "the town or village in which a railroad company may have its passenger depot building," and not "the depot platform of a railroad company." We think the definition laid down in the given instructions was substantially correct, and in accord with the decisions of this court. (*C. & A. R. R. Co. v. Flagg*, 43 Ill. 364; *C., B. & Q. R. R. Co. v. Parks*, 18 id. 465; *T. H., A. & St. L. R. R. Co. v. Vanatta*, 21 id. 188).

It is not claimed on either side, that it was usual or customary for passengers to get off and on the trains at the place where appellee was put off. It is not contended, that any passenger was ever known to get on or off at that point. A railroad company does not comply with the statute, when it puts a passenger off at a point on its track distant from a fourth to a half of a mile from the depot platform, even though such point be within the corporate limits of the village or city, where such depot is located.

The second ground of objection to the instructions is that they called the attention of the jury to the question of exemplary or vindictive damages. Without passing upon the correctness or incorrectness of such instructions, we deem it sufficient to say, that appellant itself requested the jury to be instructed upon this subject. The question was submitted to the jury at the special request of both parties. A party can not demand of the court, that it rule upon a certain branch of the case, and then be heard to say that the court had no right to rule upon that branch of the case at all. He may challenge the correctness of the finding of the jury on the question of fact submitted to them by the instructions, but he can not be heard to say that it was error for the court to com-

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Opinion of the Court.

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ply with his own request in submitting the question to the jury. (*Lahr v. M. E. R. Co.* 104 N. Y. 268.) An inspection of the instruction shows, that the question of punitive or exemplary damages was conceded by the appellant to have been involved in the case. Counsel for appellant did not ask the trial court, by instruction or otherwise, to rule that the question was not involved. On the contrary three instructions were given upon this subject at his request, which were only slightly modified by the trial court. One was, "that exemplary or vindictive damages should not be allowed or given in this case, unless the jury find from the evidence, not only that the defendant is guilty, but also that it, *by its conductor*, acted maliciously or wantonly, and with wrongful intent."

The instruction thus quoted was given as drawn by appellant's counsel, except that the court inserted the words, "by its conductor." These words do not change the principle announced in the language made use of.

Appellant makes the point that there was a misjoinder of counts in the declaration. If the record were in such shape as to permit this point to be made here, it is without force. The first count charges that the trespass was committed by appellant as a corporation. The second count substantially avers that appellant by its conductor or agent committed the trespass. It can not be said that two acts of trespass are alleged to have been committed by two persons, one by the company and one by Finch, the conductor. In substance, the trespass is charged in both counts to have been committed by appellant.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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Syllabus.

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## THE KANKAKEE STONE AND LIME COMPANY

v.

THE CITY OF KANKAKEE.

128	173
149	317
151	683

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*Filed at Ottawa April 8, 1889.*

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128	173
185	79

1. **SPECIAL ASSESSMENTS**—rule for ascertaining benefits—market value—present use of property, and of the use to which it is adapted. In a proceeding to levy and collect special assessments on property benefited, the true inquiry is, what will the influence of the proposed improvement be upon the market value of the property claimed to be benefited thereby. The jury should consider what the property is then fairly worth in the market, and what will be its value when the improvement is made.

2. In determining the present market value, it is competent for the jury to take into consideration the uses to which the property is put, or for which it is suitable or adapted. If the present value of the property is increased by reason of the use to which it is then put, or its market value will be materially affected by an interference with that use, and the proposed improvement will have that effect, that is a matter clearly competent for the consideration of the jury.

3. On a proceeding to confirm a special assessment upon certain lots, the court instructed the jury: "You are instructed that it makes no difference in this case whether or not the property assessed is used at present for such a purpose that it will not be specially benefited by the proposed sidewalk, or is put to any use to which the market value of the same is at present unimportant; and in determining your verdict, you should not take into consideration the present use to which the lots or tracts, or both, are put, but you should consider whether or not the market value of said lots or tracts, for any legitimate purpose for which the same may be used, will be increased by reason of the construction of the proposed sidewalk." Held, that the instruction was erroneous, in directing the jury that they should not take into consideration, in determining the market value, the present use to which the lots were put.

4. **PRACTICE**—time to object—as to admission of evidence. In a proceeding to confirm a special assessment for the building of a sidewalk, an objection that the ordinance for the proposed improvement was not certified to the mayor or approved by him, comes too late when made for the first time in this court. Objection to evidence should be made on the trial.

5. **INSTRUCTION**—erroneous one—whether cured by others. In a case where the evidence is conflicting, the law should be given to the jury

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Briefs of Counsel. Opinion of the Court.

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with substantial accuracy. An erroneous instruction can not be said to be cured by proper instructions on the other side, when, from the evidence, it is impossible to say that the jury did not follow the erroneous one.

APPEAL from the County Court of Kankakee county; the Hon. THOMAS S. SAWYER, Judge, presiding.

Mr. WILLIAM MOORE, and Mr. STEPHEN POTTER, for the appellant:

The ordinance set out in the record is not shown to have the approval of the mayor, nor to have ever been certified to him by the city clerk. 1 Private Laws of 1865, p. 893; sec. 5, art. 3, p. 398.

Property can not be specially assessed except for the actual benefits thereto. *Crawford v. People*, 82 Ill. 557.

The fifth instruction wholly ignores the use to which the property is put, and is erroneous. *Mittel v. Chicago*, 9 Bradw. 534.

Mr. W. R. HUNTER, for the appellee:

The objection was not made to the ordinance in the court below, and can not, therefore, be urged here.

It is claimed that appellee's fifth instruction is meaningless. If so, it can not prejudice the rights of appellant. The meaning of this instruction is, that the present use of the property is so temporary that it is not a proper basis upon which to estimate the benefits which accrue by reason of the improvement. Cooley on Taxation, 458.

Per CURIAM: The city of Kankakee required, by ordinance, the building of a sidewalk on the east side of Fifth avenue and Bourbonais Grove road, in said city, and requiring special assessments against contiguous property benefited. No objection is made to the substance of the ordinance authorizing the special assessment, or the appointment and report of com-

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Opinion of the Court.

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missioners thereunder. The commissioners appointed for such purpose made report to the city council, which was approved, and appellant not having constructed said sidewalk along its property, as required by said ordinance, a petition was, by order of the city council, presented to the county court, in conformity with the provisions of the act respecting cities and villages. Commissioners were appointed by the court, who made a return of the assessment roll, as contemplated by said act. On application for confirmation thereof, certain objections were filed by appellant, and thereupon such proceedings were had that a jury was impaneled, who, after hearing the evidence, etc., returned their verdict into court, fixing the benefits accruing to appellant's land from the construction of said sidewalk. The court modified said assessment roll to conform to the finding of the jury, and rendered its judgment affirming said roll so modified.

The first point urged is, that the ordinance authorizing such proceeding was not properly passed, in that it was not certified to the mayor or approved by him. The objection, if tenable, can not be made for the first time in this court. The ordinance seems to have been read to the jury, without objection.

At the instance of the city, the court gave the jury the following instruction:

"You are instructed that it makes no difference in this case whether or not the property assessed is used at present for such a purpose that it will not be specially benefited by the proposed sidewalk, or is put to any use to which the market value of the same is at present unimportant; and in determining your verdict, you should not take into consideration the present use to which the lots or tracts, or both, are put, but you should consider whether or not the market value of said lots or tracts, for any legitimate purpose for which the same may be used, will be increased by reason of the construction of the proposed sidewalk."

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Opinion of the Court.

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It is insisted that the first portion of this instruction is unintelligible. Be this as it may, considered as a whole, the instruction contains the proposition, that the present use to which the premises are put by the owner must be excluded from consideration by the jury in determining the market value of the lots. The true inquiry in all such cases is, what will the influence of the proposed improvement be upon the market value of the property claimed to be benefited thereby. The jury should consider what the property is then fairly worth in the market, and what will be its value when the improvement is made. (Cooley on Taxation, 459.) In determining the present market value, it is competent for the jury to take into consideration the uses to which the property is then put or for which it is suitable or adapted. If the present market value of the property of appellant was increased by reason of the use to which it was then put, or its market value would be prejudicially affected by an interference with that use, and the proposed improvement would have that effect, it was clearly competent for the consideration of the jury. It was said in *Chicago and Evanston Railroad Co. v. Jacobs*, 110 Ill. 414, that in these cases "the real issue was, what was the market value of the property for any purpose for which it was adapted or might be used." See, also, *Dupuis v. Chicago and North Wisconsin Railway Co.* 115 Ill. 97; *Jacksonville and Southeastern Railway Co. v. Walsh*, 106 id. 253; *Calumet River Railway Co. v. Moore et al.* 124 id. 329.

The purposes for which the premises of appellant were used were entirely legitimate, and it was insisted they were more valuable for that use than for any other, and that the construction of the proposed sidewalk, in the manner contemplated, would materially decrease the value of the property, for the reason, as alleged, that it would interfere with that use of the property. If this was so, it was clearly competent for the jury to consider in determining the present market value

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Opinion of the Court.

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of appellant's property, and it was error to instruct the jury they should not take into consideration, in determining the market value, "the present use to which the lots or tracts, or both, are put."

It is said, however, that the jury were properly instructed on behalf of appellant, and that they could not therefore have been misled by the instruction complained of. There was a conflict in the evidence, and it seems to us the preponderance was with appellant upon the question of whether said property was benefited or not, and while we would not be disposed to interfere upon that ground, the law should have been given to the jury at least with substantial accuracy. If it be true the law was correctly given in appellant's series, it is impossible to say that the jury followed them rather than the one containing the vicious element. Indeed, aside from the report of the commissioners, which is made evidence by the statute, it would seem, from this record, that the weight of evidence is with appellant that the present market value of the premises, considering the use to which it is put and is adapted, would be depreciated rather than increased by the proposed improvement; and the conclusion can hardly be resisted that the jury followed appellee's instruction, and excluded from consideration the present use of the property in making up their verdict.

Other minor objections are pointed out, which doubtless will be corrected on another trial, and which it is here unnecessary to notice.

For the error indicated, the judgment of the county court will be reversed, and the cause remanded for further proceedings.

*Judgment reversed.*

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Syllabus.

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SIMON GRUHN

v.

NANCY R. RICHARDSON *et al.*

*Filed at Springfield April 5, 1889.*

1. **VENDOR'S LIEN**—*not assignable—lost by transfer of debt.* The right to enforce a vendor's lien is personal, and is therefore not transferable. It ceases to exist when the vendor sells and indorses the note representing the purchase money, although the transfer is made with the consent or upon the advice of the debtor.

2. **HOMESTEAD**—*what will defeat the right—effect of transfer of note given for purchase money—fraudulent acts.* A person purchased a house and lot, giving his promissory note for the purchase money, after which he conveyed the premises to his wife, from which time the property was occupied by them both as their homestead. It was of less value than \$1000. A third person, at the husband's request, bought the note given for the purchase money. It was held, that the purchaser of the note acquired no equity as against the wife's homestead. Even if she had owed the note herself, and had requested such third party to pay the same, his doing so could have given him no right as against her estate of homestead.

3. Even the fraudulent acts of the party entitled to a homestead are not allowed to divest that right.

4. **TRUST**—*voluntarily assumed—not to be repudiated.* G., having a small claim against a debtor who was being harassed by creditors, under the guise of friendship falsely advised the debtor and his wife that the creditors would take their homestead, which was in the wife, unless they mortgaged the same to him, and promised that if they would mortgage the same, he would, when he acquired the title, convey to the debtor's wife, and thereby induced them to execute a mortgage for the sum he claimed, and afterward induced them to give a fictitious note and mortgage to a third person for \$1000, which G. afterward procured to be assigned to himself, and obtained a decree of foreclosure and sale, professedly for the benefit of the wife, but afterward refused to convey to her, disavowing and denying the trust: Held, that G. could not be allowed to repudiate his assumed trust, and that a court of equity would compel him to convey to the wife, or set aside the mortgages and sale of the property to him.

5. **SAME—Statute of Frauds.** Where a party, by voluntarily assuming a confidential relation, as, that of a trustee, to save the homestead of

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Briefs of Counsel.

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another, and by means of confidence thus inspired obtains the title thereto, and refuses to perform his promises, the law will raise a constructive trust, which a court of equity will enforce, and the Statute of Frauds will have no application.

APPEAL from the Circuit Court of Macoupin county; the Hon. JESSE J. PHILLIPS, Judge, presiding.

Messrs. ANDERSON & BELL, for the appellant:

The complainant is barred of the relief sought, by her negligence. She had no right to blindly adopt the representations of Gruhn, instead of seeking information which was accessible to her. *Hicks v. Stevens*, 121 Ill. 186; *Young v. Young*, 113 id. 432; *Tuck v. Downing*, 76 id. 71; Story's Eq. Jur. sec. 191.

The legal presumption is, that deeds and mortgages are made in good faith, and without fraud. *O'Neal v. Boone*, 82 Ill. 589.

Parol evidence to set aside a deed or mortgage must be clear and convincing. *Wilson v. McDowell*, 78 Ill. 514.

The violation of a parol agreement to convey or reconvey land will not constitute such a fraud as to take the case out of the Statute of Frauds. *Young v. Young*, 113 Ill. 430; *Rogers v. Simmons*, 55 id. 76; *Perry v. McHenry*, 13 id. 227; *Dunbar v. Bonesteel*, 3 Scam. 32.

If the mortgage is to be rescinded or held for naught, then appellees must return to appellant all that in equity is his. Before a party can rescind a contract for fraud, he must return, or offer to return, the consideration received. *Smith v. Brittenham*, 98 Ill. 188; 109 id. 540.

Messrs. RINAKER & RINAKER, for the appellees:

The circumstances of the execution of the mortgage, alone, are enough to brand it as fraudulent. There was no actual danger to the homestead, as it was then worth only \$800 or \$900, and was exempt from any judgment against the husband.

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Opinion of the Court.

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If Gruhn obtained the mortgages upon false representations and promises, he can in no case disregard them, although he may have been compelled to give up part of his security, and although the property may have since depreciated in value.

The vendor's lien, evidenced by the Kemper note, which Kemper might have enforced, not only was not in fact, but could not in law, have been transferred by him to Gruhn. *Moshier v. Meek*, 80 Ill. 79.

If Gruhn intentionally misrepresented the facts in order to mislead or entrap or cheat appellees, or to obtain an undue advantage of them, there is positive fraud, in the truest sense of the term. Story's Eq. Jur. secs. 192, 330.

If, and especially at his request, "confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage." (Story's Eq. Jur. sec. 323.) In the one case his advantage is the result of actual fraud; in the other case his position is obtained by constructive fraud.

The defense of the Statute of Frauds is no answer to appellees' case, and the facts proven.

Mrs. Richardson received no consideration whatever for the execution of these mortgages, except Gruhn's promise, based on his false or mistaken statement of danger to her homestead, to use it only to save the homestead for her. Can he, with full performance on her part, repudiate his promise and retain the benefit so obtained, because his promise was only verbal?

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This appeal brings before us for review a decree of the circuit court of Macoupin county, setting aside certain mortgages, and a sale thereunder, made pursuant to a previous decree of that court.

The case made by the evidence on behalf of the complainant is, in substance, this: In December, 1881, John Richardson,

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Opinion of the Court.

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who had all his life been a farmer, and who had consequently no previous experience in trade, and who had no practical knowledge in that respect, sold his farm for \$8000, and engaged in trade in the village of Medora, in Macoupin county. He first tried the grocery business, but that soon resulting disastrously, he abandoned it for the clothing business, and a like result as in the grocery business speedily followed in this business. He became the owner of several village lots,—among others, of lot 4, in block 19, in Rice's third addition to the village,—which he purchased of William Kemper, but only partially paid for. On the 19th of March, 1883, Kemper conveyed the lot to Richardson, and at the same time, Richardson made his note of that date, payable to Kemper, for \$550, (the balance due upon the lot,) twelve months after date, with eight per cent interest. There was, and still is, a dwelling house upon the lot, and Richardson immediately took possession of the lot and made his residence in the dwelling house. On the 3d day of April, 1883, he conveyed the lot to his wife, Nancy R., the complainant, and the lot was then, and it has been ever since, occupied by them as and for their homestead, and it is of less value than \$1000.

On the 19th of October, 1883, the Bank of Medora recovered a judgment against John Richardson for the sum of \$2223.46, and at that time he was indebted to various other parties in different amounts, the aggregate exceeding his ability to pay. On the 24th of November following, he was served with summons at the suit of Joseph Hill, upon which Hill obtained judgment in December thereafter, and at the time that suit was commenced other suits were threatened, which were, several months afterward, prosecuted to judgment. Simon Gruhn had become the owner, by assignment, of a promissory note made by McKernan & Richardson on the 21st of March, 1883, to Ryan & Elwood, for \$625, with eight per cent interest from date, due May 1, 1883, upon which a credit of \$300, paid April 24, 1883, was indorsed. Gruhn also claimed that Rich-

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Opinion of the Court.

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ardson was at the same time indebted to him in the further sum of \$300.

On the 28th of November, 1883, Gruhn, having obtained the confidence of John and Nancy R. Richardson, and induced them to believe that he was their friend, anxious to aid them in their financial embarrassments, and that he was possessed of ample knowledge of the law to correctly instruct and advise them therein, went to them and represented to them that the only way by which they could save their homestead from the creditors of John, was to mortgage the same, together with other village lots, to him; that the creditors could set aside, as fraudulent, the conveyance by John to Nancy R., and sell the homestead, but that if they would mortgage the homestead, together with the other village lots, to him, he (Gruhn) could and would hold it against the other creditors, for Nancy R., and when he should obtain a title thereto, through a sale and purchase, he would convey it to her. He represented that it was indispensable that they should act promptly and secretly, and warned them against speaking to others of what they did. They were ignorant of their legal rights in regard to the homestead, and believed in and relied upon the truthfulness of what he said, and thereupon, thus influenced and controlled, Richardson made his promissory note to Gruhn, payable twelve months after date, for \$300, with interest at eight per cent per annum from date; and he and his wife, Nancy R., then also made a mortgage to Gruhn, of the homestead and other village lots, to secure the balance due on the Ryan & Elwood note and this \$300 note. Two days afterwards,—namely, on the 30th of November, 1883,—Gruhn informed the Richardsons that his mortgage was not large enough to protect the homestead against Richardson's creditors, and persuaded and induced them to execute a promissory note to George Wright, to whom neither of them was indebted, for \$1000, payable, with eight per cent interest, one year after date, and to execute a mortgage on the homestead to secure it, saying, (and they

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Opinion of the Court.

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believing what he said,) that this mortgage would help secure the homestead. Wright never claimed that anything was due him on account of this transaction, but always admitted that he entered into it as a mere matter of accommodation.

On the 2d of April, 1884, Gruhn made an arrangement between William Kemper, George Wright and John Richardson, whereby Kemper let Gruhn have his note on Richardson, indorsed by him without recourse, and Gruhn then exchanged that note with Wright for Wright's note and mortgage, which Wright indorsed and delivered to him. The agreement between Kemper and Gruhn was, in substance, that Gruhn was to collect the money for Kemper if he could. Wright claims no interest in the Kemper note, and has delivered it to Richardson's attorney.

On the 20th of January, 1885, Gruhn filed his bill to foreclose his mortgage and the Wright mortgage, in the circuit court of Macoupin county, against John Richardson and Nancy R. Richardson, alleging therein, among other things, the assignment of the Wright note and mortgage to him, and his ownership thereof. Summons was properly served upon the Richardsons, but they were persuaded by Gruhn to not appear and make defense, he representing to them that he knew best what to do—that he was acting for them, and would attend to their interests better than they could themselves; that he would bid in the property at the sale to be made under decree of foreclosure, and afterwards convey the homestead to Nancy R. A decree *pro confesso* was rendered on the 19th of February, 1885, finding that there was due Gruhn, on the mortgages, \$1942.43, and directing a sale of the mortgaged premises for the payment of the same.

On the 28th of May, 1885, Gruhn made another agreement with Kemper, whereby Gruhn gave Kemper, for Kemper's note on Richardson, his note for \$300, payable absolutely, and his note for \$200, in regard to which it was agreed that in the event either that Gruhn should assign his certificate of pur-

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Opinion of the Court.

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chase, which it was contemplated he would obtain at the foreclosure sale, or convey the premises, within one year after the sale, for more than enough to pay his own demands against the property, with interest, then he was to pay the excess to Kemper to the extent of the balance due him from Richardson. John Richardson acquiesced in this arrangement, but there is no evidence affecting Nancy R. Richardson by it, and she expressly denies all knowledge of it.

Gruhn denies that he agreed to secure a homestead for Nancy R.; that he used other persuasions to induce them to sign the mortgage than his claims as a general creditor, a neighbor and a friend of John Richardson. He denies that he did or said anything to induce the Richardsons to not appear and defend the foreclosure proceeding, and he denies that he, at any time, represented himself to have special law knowledge in respect of questions pertinent to their rights in the premises. He was, to some extent, sustained by the evidence of other witnesses.

The court below adopted the view that the evidence sustained the case made by the evidence on behalf of the complainant, and after having carefully considered the entire record, we are unable to say that there is clearly error in that ruling. It would subserve no useful end to recapitulate and comment upon the evidence in detail, and we shall therefore proceed to an examination of the legal principles applicable to the view of it, as expressed.

The right which Kemper had to enforce a vendor's lien was personal to himself, and was ended the moment that he indorsed the note and delivered it to Gruhn, notwithstanding Richardson consented to or advised that transfer. (*Richards v. Leaming*, 27 Ill. 432; *Keith et al. v. Horner*, 32 id. 524; *McLaurie v. Thomas*, 39 id. 291; *Lehndorf et al. v. Cope*, 122 id. 333.) But no attempt was ever made to enforce a vendor's lien. Kemper filed no bill for any purpose, and the bill of Gruhn was only to foreclose mortgages for the payment of

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Opinion of the Court.

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promissory notes (not including that of Kemper) described in the mortgages, and the agreement subsisting between Gruhn and Kemper, at the time of the filing of the bill and obtaining the decree of foreclosure, simply was that Gruhn would collect Kemper's note if he could. He took a decree for the amount of indebtedness secured as appeared upon the face of the mortgages, and accruing interest, and this included the \$1000 of fictitious indebtedness, and the accruing interest thereon; and the notes which Gruhn subsequently gave to Kemper, seem to assume that \$300 of the amount is to take the place of so much of the fictitious indebtedness, inasmuch as the \$300 note was payable absolutely. The \$200 note has not been paid, and is not to be paid unless the amount shall be realized hereafter in the way indicated in the agreement. It is manifest that in all this Gruhn has acted voluntarily, and for what he doubtless supposed would subserve his own interests. He knew that the vendor's lien could not be transferred to him, because he is charged with a knowledge of the law; and Nancy R. never consented that any part of the Kemper debt should be substituted for and take the place of so much of the fictitious note to Wright. If the Kemper lien was to be enforced, it is not perceived that it could make it any less burdensome to Nancy's homestead that it should be done by Gruhn. But it was important to Gruhn to get the Kemper claim out of his way, for, having priority, it depreciated his mortgage security by that amount, and so the entire transaction was manifestly to benefit him, alone; and he is not entitled to any claim of merit, because it was impossible to thus benefit himself without extinguishing the vendor's lien upon the homestead, and to that extent benefiting Nancy R.

The indebtedness to Kemper was not that of Nancy R. The lien imposed no personal obligation upon her, and so when it was removed without her act, she incurred no liability thereby. But even if she had owed the debt herself to Kemper, and had personally requested Gruhn to pay it, his paying could have

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Opinion of the Court.

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given him no rights as against her estate of homestead. (*Winslow v. Noble*, 101 Ill. 194; *Eyster v. Hathaway*, 50 id. 522.) Even the fraudulent acts of the party entitled to a homestead are not allowed to divest that right. (*Leupold et al. v. Krause*, 95 Ill. 440.) The case made is, as we think, governed by the ruling in *Allen et al. v. Jackson et al.* 122 Ill. 567.

Gruhn assumed, voluntarily, a confidential relation,—in legal contemplation, that of trustee for Nancy R. Richardson, to secure her homestead,—and he shall not now be allowed to deny his trust. He knew that she confided in him, and believed his representations to be true, and that solely because she did so confide and believe, she executed the mortgages. Having since repudiated his assumed trust, she was justified in filing the present bill. He can not be allowed to enjoy a personal advantage by saying that he was not entitled to the confidence he induced her to place in him.

*Wolford v. Herrington*, 74 Pa. St. 311, is quite analogous to the present case. There, land was advertised to be sold on a judgment against John Wolford. Herrington went to the wife of Wolford, and asked her if she knew that the land was to be sold. She said they could not sell it, for she had a deed. He said there might be some trouble, and she had better let it be sold, and let him buy it in for her. She said, in that case she could get the money from Mr. Randolph. He said that Randolph would need the money before he would, and that he would bid it in and pay the money, and allow her two years to pay him back the money, with interest. She assented to this finally, and he bought the land at the sale, but he afterwards refused to allow redemption to be made, and to convey as he had agreed. The court, speaking through SHARSWOOD, J., said: "Her testimony alone, if believed by the jury,—and there was no contradiction of it,—showed a clear case of fraud on the part of Herrington, within our late decisions of *Beegle v. Wentz*, 5 P. F. Smith, 369, and *Boynton v. Housler*, 23 id. 453. She had a claim on the land in her own right by an un-

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Syllabus.

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recorded deed—whether good or bad, conveying a good title or not, is unimportant; and these cases settle that where one having any interest is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter, of the confidence, is such a fraud as will convert the purchaser into a trustee *ex malaficio*." See, also, Wharton on Agency. sec. 240, and Bigelow on Fraud, p. 231.

The Statute of Frauds has no application to the present case. The trust is not express, but is raised by construction. *Allen et al. v. Jackson et al. supra*; Kerr on Fraud and Mistake, (Bump's ed.) 151, 179; *Reed et al. v. Peterson*, 91 Ill. 295; *Haigh v. Kaye*, Law Rep. (7 Ch. App. Cas.) 469; Bispham's Eq. sec. 231.

The decree below must be affirmed.

*Decree affirmed.*

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EDWARD C. GILES *et al.*

v.

MARY ANSLOW *et al.*

*Filed at Springfield April 5, 1889.*

1. **WILLS**—*quantity of estate devised—whether a fee, or less than a fee.* It is provided by statute, that every grant, conveyance or devise shall be deemed a fee simple estate of inheritance, though lacking the use of words necessary, at the common law, to create such an estate, if a less estate be not limited by express words, or does not appear to have been granted, conveyed or devised by construction or operation of law.

2. A simple devise of land, without any words of perpetuity or inheritance, under the statute, is sufficient to pass an absolute estate in fee, unless a contrary intent is shown in other parts of the will. The intention of the testator, which controls, is to be ascertained from the whole will. If a less estate than a fee is intended, it is wholly immaterial in what part of the will such intention is manifested.

128	187
135	400
128	187
142	606
128	187
161	66
128	187
163	596
128	187
177	916
128	187
181	518
128	187
194	402
197	566
128	187
201	296
128	187
215	187

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Syllabus.

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3. It is the disposition of the courts to adopt such a construction as will give an estate of inheritance to the first donee. When, therefore, the fee is devised by a clause or clauses of a will, and other portions or clauses are relied on as limiting or qualifying the estate thus given, they should be such as to show a clear intention on the part of the testator to thus limit or qualify the estate granted. Such an intent should clearly and unequivocally appear.

4. *SAME—devise over upon condition—as, the settlement of the estate before the death of the first taker—as determining where the fee shall go.* A testator devised all his estate, real and personal, to his wife, subject to the payment of his just debts, and appointed her his sole executor. The will further provided, that in case of the death of his wife before the settlement of his estate, all the testator's property should be equally divided between his two nephews: *Held*, that the settlement referred to, which would operate to defeat the devise to the wife, was a settlement or adjustment of the estate in the due course of administration in the county court, and that such settlement in her lifetime was a condition upon which the devise to her depended.

5. Until such settlement of the estate, which included the payment of the debts, the amount devised was uncertain, as it might become necessary to sell land, or some part thereof, to pay the claims against the estate; but when the administration was completed and closed, her rights became fixed and determined. If made during her life, she took the remaining estate absolutely; if not, it went to the nephews.

6. In this case, a final settlement of the estate was made in the lifetime of the first donee, and so it was held, that the clause devising the estate to the nephews in the event of the death of the widow before the settlement of the estate, did not in any manner affect the devise to the widow, and that she having performed the condition annexed to her right, her estate ceased to be conditioned, and that the condition on which the nephews were to take, failed.

7. *SAME—whether a trust rests upon the subject of a devise.* A trust may be impressed upon the subject of a devise, but an intent to create the trust must clearly appear. If the intention of the testator be doubtful, precatory words will not be construed into a declaration of a trust.

8. Mere expressions of a desire that the donee will be kind to, remember, consider, deal justly by, educate and provide for, or to do justice to a certain class of persons, will raise no trust.

9. In the absence of words showing a contrary intent, a gift, whether of land or personal property, will be presumed to be absolute, and before it will be held to be in trust, it must be clear that the testator intended the property bequeathed, or some part of it, to be applied by the donee for the purpose of the trust,—and this is to be determined from a consideration of the entire will, and the circumstances and con-

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Brief for the Plaintiffs in Error.

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dition of the estate devised. So the fact that personal property was included in the devise to a wife, and was expected by the testator to go with the real estate to her, may be considered as indicative of an intent to give her an absolute estate in the land.

10. No trust will be implied from precatory words, where the donee may, at his discretion, apply the property to other purposes, or where there is an express direction that the donee's absolute interest is not to be curtailed, or when the precatory words are not stated to be obligatory, or when the donee is to take free and unfettered.

11. Where the words of a gift expressly point to an absolute enjoyment by the donee himself, the natural construction of subsequent precatory words is, that they express the testator's belief or wish without imposing a trust.

12. By the first clause in a will a testator made an absolute devise of all his estate to his widow, upon the sole condition that she should settle up his estate. By the following clause the estate was devised to his nephews in case his widow should die before the settlement of the estate, after which are these words: "I have full confidence in my beloved wife, Mary, that she will do what is best and proper with my effects, and that she would do with my property the same as I would wish to have done—that she will take care of the proceeds. She is, by this gift, free from all restraint, to do as may seem to her best and proper." Held, that the will created no trust on the subject of the devise in favor of the testator's nephews, or for any one else, and that the wife took an absolute estate in fee upon the settlement of the estate in her lifetime.

WRIT OF ERROR to the Circuit Court of Tazewell county; the Hon. NINIAN M. LAWS, Judge, presiding.

Mr. B. S. PRETTYMAN, for the plaintiffs in error:

Nothing can be admitted, but everything must be proved against infants, and the record must show the evidence to sustain the decree. *Hitt v. Ormsbee*, 12 Ill. 166; *Rhoads v. Rhoads*, 43 id. 240; *Barnes v. Hazleton*, 50 id. 430; *Quigley v. Roberts*, 44 id. 503; *Gooch v. Green*, 102 id. 513.

There is no direct averment in the bill that Mary Anslow was, when she filed the bill, entitled to the fee of the premises, and no direct averment of the fact of the settlement of the estate. General references in the bill to exhibits or records are not proofs, and can not sustain the decree. *White v. Morrison*, 11 Ill. 361.

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Brief for the Defendants in Error.

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The will set forth in the record shows an intention that the wife should have the use of the testator's property while she lived, unrestrained, to do with it as she thought best, and should make a settlement of it in remainder on his two nephews, but in the event that she died before making a settlement of the estate, then that his estate should be equally divided between the nephews. The word "settlement" was doubtless used in the English sense of the term, as a provision made for, or a remainder preserved, settled on or for the use of his nephews.

His desire that his estate should be so settled upon them is expressed to her in the will. His confidence that she would do what was best with his effects, and take care of the proceeds of it, is indicative of the trust. The words "wish" and "will" are imperative, and create a trust. *McKee's Admrs. v. Means*, 34 Ala. 349; *Dresser v. Dresser*, 46 Me. 48; Hill on Trustees, 11; *Harrison v. Grant*, 2 Gratt. 1.

Technical language is not necessary to create a trust. It is enough that the intention is apparent. Words merely precatory are sufficient. 1 Jarman on Wills, 385.

Mr. A. B. SAWYER, and Mr. WILLIAM DON MAUS, for the defendants in error:

The recital of evidence in a decree can not be questioned in the Appellate Court, any more than the statements in a bill of exceptions. *Moore v. School Trustees*, 19 Ill. 83; *Cooley v. Scarlett*, 38 id. 318.

If either party is dissatisfied with the finding of the court, he should preserve the evidence in a certificate. *Walker v. Carey*, 53 Ill. 470.

Where the facts are found by the court, and recited by it in the decree, the finding can not be reversed, unless all the evidence heard on the trial is preserved in the record, and thus brought before the court. Where the evidence is not all preserved, it will be presumed that the evidence heard and not preserved was sufficient to authorize the finding. *Allen v.*

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Brief for the Defendants in Error.

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*LeMoyné*, 102 Ill. 28; *Corbus v. Teed*, 69 id. 208; *Morgan v. Corlies*, 81 id. 75; *Rhoades v. Rhoades*, 88 id. 139; *Walker v. Abt*, 83 id. 231; *Hannas v. Hannas*, 110 id. 64; *Kelsey v. Starkey*, 11 Bradw. 87.

Our Statute of Conveyances provides, that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." Rev. Stat. 1874, page 275, sec. 18.

In the absence of limiting or qualifying words, a fee is devised, unless a less estate appears to have been devised, by construction or operation of law. Surely, it will not be contended that a less estate than a fee was devised to Mary Anslow, by operation of law.

The settlement of the estate referred to in the will, had reference to the adjustment of the affairs of the estate in the county court, by the payment of the funeral expenses, debts, and expenses of administration and distribution of the residue. Rev. Stat. 1845, p. 56, sec. 123; Rev. Stat. 1874, chap. 3, sec. 112; *Frame v. Frame*, 16 Ill. 155; *Calkins v. Estate of Smith*, 41 Mich. 409.

The primary consideration is the testator's intention. *Hamlin v. Express Co.* 107 Ill. 443; *Walker v. Pritchard*, 121 id. 231.

Illinois cases where wills have been construed as to whether a life estate or a fee was intended: *Boyd v. Strahan*, 36 Ill. 355; *Mulberry v. Mulberry*, 50 id. 67; *Bergan v. Cahill*, 55 id. 160; *Markillie v. Ragland*, 77 id. 98; *Johnson v. Johnson*, 98 id. 564; *Bland v. Bland*, 103 id. 11; *Hamlin v. Express Co.* 107 id. 443; *Walker v. Pritchard*, 121 id. 231; *Brownfield v. Wilson*, 78 id. 467.

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Brief for the Defendants in Error,

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Courts will construe wills so as to give an estate of inheritance to the first donee. 1 Redfield on Wills. (2d ed.) 446; *Leiter v. Sheppard*, 85 Ill. 242.

The plain and unambiguous words of a will must prevail, and are not to be controlled or qualified by any conjectural or doubtful construction, growing out of the situation, circumstances or condition of the testator, his property or family. 1 Redfield on Wills, (2d ed.) 429.

When personal property is given in the same clause with realty, it is an evidence that a fee was intended. *Leiter v. Sheppard*, 85 Ill. 242.

When debts are made a charge on the estate, the donee takes a fee. *King v. Ackerman*, 2 Black. 415; *Denn v. Molton*, 5 T. R. 562; 2 Washburn on Real Prop. 561, par. 25; *Friedman v. Steiner*, 107 Ill. 125; *West v. Fitz*, 109 id. 436; *Kaufman v. Breckenridge*, 117 id. 306; *Rountree v. Talbot*, 89 id. 246.

An absolute power of disposition annexed to a primary devise in fee, is deemed conclusive of the existence in the primary donee of an absolute estate. A valid executory devise can not co-exist with a devise of a primary fee, accompanied with an absolute disposing power in the first taker, and an executory limitation, by will, of real or personal property, after a gift of an absolute estate, is void. 4 Kent's Com. 270; 2 Washburn on Real Prop. 669.

To create a trust by precatory words, it must clearly appear that a binding duty was intended to be imposed, and no discretion left in the trustee. 2 Redfield on Wills, 414, 415.

If the gift be absolute in the first instance, subsequent precatory words will not cut it down to a mere trust. *Bernard v. Minshall*, Johns. Ch. 287; *Bensear v. Kinnear*, 2 Giff. 195.

Expressions of request, however strong, will not create a trust, when the will contains an expression that the donee is nevertheless free to act in his own discretion. 2 Redfield on Wills, 418, pl. 12, note 28.

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Opinion of the Court.

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Mere words of desire, recommendation and confidence, create no trust. *Pennock's Estate*, 20 Pa. St. 268; *Mills v. Newberry*, 112 Ill. 123.

Mr. JUSTICE SHORE delivered the opinion of the Court:

This bill was filed for the purpose of obtaining a construction of the last will and testament of Richard Anslow, deceased. It may be premised that whatever estate was devised was subject to the payment of the testator's lawful debts.

The portion of the will involved in this construction, and necessary to an understanding of what will follow, is: "To my beloved wife, Mary Anslow, I do give and bequeath all of which I die possessed, both real and personal. My real estate, so far as now known, is described as follows:" (here follows a description of lands;) "and I do hereby appoint her (my beloved wife) my sole executor, who is to enter upon and discharge said duties, without giving of bond, and free from all restraint. It is further my will, that in case of the death of my wife, Mary, before the settlement of my estate, that my property, of which I die possessed, shall be equally divided between my two nephews, Edward Charles Giles and Richard A. Giles. I have full confidence in my beloved wife, Mary, that she will do what is best and proper with my effects, and that she would do with my property the same as I would wish to have done,—that she will take care of the proceeds. She is, by this gift, free from all restraint to do as may seem to her best and proper."

The settlement referred to, which should operate to defeat the devise to the wife, was a settlement or adjustment of the estate in due course of administration in the probate court. The clause, "that in case of the death of my wife, Mary, before the settlement of my estate," can refer to nothing other than the adjustment of the affairs of the estate, by which its debts are paid, its credits collected, and the residue distributed

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Opinion of the Court.

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to the persons entitled to take the same under the will. (*Calkins, Exr. v. Smith et al.* 41 Mich. 409.) To enable the widow to thus settle the estate, she was made sole executrix, and was authorized to enter upon the discharge of her duties as executrix "free from all restraint." The settlement of the estate in her lifetime was a condition upon which the devise to her depended. Until such settlement it must remain uncertain what amount was devised. It might be necessary to make sale of the lands, or some part of them, to adjust claims against the estate. When, however, the administration was completed and closed, her rights became fixed and determined. If made during her lifetime, she took the estate absolutely. If not, it went to the nephews named. The bill alleges her appointment as executrix by the proper court, the due administration of the estate, final settlement, and discharge of the executrix by the court. The decree finds the allegations of the bill to be true. There being no bill of exceptions or certificate of evidence preserving the evidence heard by the trial court, and it appearing, by recitals in the decree, that the cause was heard upon "the proofs, oral and documentary, offered by the complainant on the hearing," it must be assumed that a final settlement of the estate had been made prior to the filing of the bill herein, and in the lifetime of Mary Anslow, widow of the testator.

The 13th section of the Conveyance act provides: "Every estate in land which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." Under this statute, the first clause of the will before us is clearly sufficient to invest the widow with an absolute estate in fee, and we must hold that she took such an estate, unless the subsequent clauses of the will show a contrary intention. The intention of the tes-

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Opinion of the Court.

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tator, which must govern, is to be ascertained from the whole will. If it was intended that a less estate should be taken by the wife, it is wholly immaterial in what part of the will such intention is manifested. It is, however, the disposition of courts to adopt such a construction as will give an estate of inheritance to the first donee. *Leiter v. Sheppard*, 85 Ill. 243; *Sherman v. Wooster*, 26 Iowa, 277; 1 Redfield on Wills, (3d ed.) 421, 422. When, therefore, the fee is devised by a clause or clauses of a will, and other portions or clauses are relied on as limiting or qualifying the estate thus given, they should be such as show a clear intention on the part of the testator to thus limit or qualify the estate granted. Such an intent should clearly and unequivocally appear. See *Walker v. Pritchard*, 121 Ill. 221; *Jones v. Jones*, 124 id. 254.

The clause of the will devising the estate to the two nephews of the testator, in the event of the death of the widow before the settlement of the estate, can not be held in any manner to affect the devise to the widow. The devise to the nephews was contingent, depending on the happening of an event, which, by the settlement of the estate during the lifetime of the widow, became impossible. Upon final settlement of the estate in the county court, the devise to the widow ceased to be conditional, and the condition on which the nephews were to take, failed.

The clause of the will following the provision for the disposition of the estate upon the death of the widow before the settlement of the estate, is relied on as limiting the estate of the wife to her life, and as creating a trust in the lands devised in favor of the nephews. There can be no doubt that a trust may be thus impressed upon the subject of the devise, but an intent to create the trust must clearly appear. If the intention of the testator be doubtful, precatory words will not be construed into a declaration of a trust. (Theobald on the Law of Wills, 379.) It is there said: "Therefore, mere expressions of a desire that the donee will be kind to, (*Buggins v. Yates*, 9 Mod. 122, 8 Vin. Ab. pl. 27,) remember, (*Bardswell*

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Opinion of the Court.

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v. *Bardswell*, 9 Sim. 319,) consider, (*Sale v. Moore*, 1 Sim. 534,) deal justly by, (*Pope v. Pope*, 10 Sim. 1,) educate and provide for, (*Macnab v. Whitbread*, 17 B. 299, *Winch v. Bruton*, 14 Sim. 379, *Fox v. Fox*, 27 B. 301,) or do justice to, (*Ellis v. Ellis*, 23 W. R. 382,) a certain class of persons, will raise no trust."

In the absence of words showing a contrary intent, a gift, whether of land or personal property, will be presumed to be absolute, and before it will be held to be in trust, it must be clear that the testator intended the property bequeathed, or some part of it, to be applied by the donee for the purpose of the trust; and this is to be determined, as before stated, from a consideration of the entire will, and the circumstances and condition of the estate devised. So the fact that personal property was included in the devise to the wife, and was expected by the testator to go with the real estate to her, may be considered as indicative of an intent to give her an absolute estate in the land. *Hawkins on Wills*, 131, and cases cited; *Leiter v. Sheppard*, *supra*.

The author already quoted from (page 381) states the doctrine in respect of the creation of trusts, as follows: "No trust will be implied from precatory words: (a) where the donee may, at his discretion, apply the property to other purposes; (*LeFroy v. Flood*, 4 Ir. Ch. 1; *Curtis v. Rippon*, 5 Mad. 434; *House v. House*, 23 W. R. 22; *Ex parte Payne*, 2 Y. & C. Ex. 636;) (b) or where there is an express direction that the donee's absolute interest is not to be curtailed; (*Huskinson v. Bridge*, 15 Jur. 738; *Eaton v. Watts*, 1 Eq. 151;) (c) where the precatory words are stated not to be obligatory; (*Young v. Martin*, 2 Y. & C. C. 582; *Shepherd v. Nottidge*, 2 J. & H. 766; *Cole v. Hawes*, 4 Ch. D. 238;) (d) or where the donee is to take free and unfettered. *Meredith v. Heneage*, 1 Sim. 542; *Hoy v. Master*, 6 id. 568; *White v. Briggs*, 15 id. 33."

In *Jarman on Wills*, (page 388,) it is thus stated: "And when the words of a gift expressly point to an absolute en-

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Opinion of the Court.

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joyment by the donee himself, the natural construction of subsequent precatory words is, that they express the testator's belief or wish, without imposing a trust. Thus, in *Meredith v. Heneage*, 1 Sim. 542, when the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife, unfettered and unlimited, in full confidence, and with the firmest persuasion that in her future disposition and distribution thereof she would distinguish the heirs of his late father, by devising and bequeathing the whole of his said estate, together and entire, to such of his father's heirs as she might think best deserved her preference, it was held that the wife was absolutely entitled for her own benefit, Lord ELDON considering that the testator intended to impose a moral, but not a legal, obligation on his wife, for which he relied much (as did also Lord REDESDALE,) on the words, "unfettered and unlimited." See, also, 2 Story's Eq. Jur. sec. 1070.

The rule is stated in 2 Redfield on Wills, 418, as follows: "It seems clear, that when the expression of request or desire in the will is ever so strong, it will not be construed to create a trust for others, when the will contains an expression that the devisee is, nevertheless, to be free to act in his own discretion."

The clause relied on in this case as containing such precatory words as will create a trust, is as follows: "I have full faith and confidence in my beloved wife, Mary, that she will do what is best and proper with my effects, and that she would do with my property the same as I would wish to have done, —that she will take care of the proceeds." For whose benefit did he expect her to manage the estate and take care of the proceeds of the property? Manifestly, for her own benefit, and to guard against improvidence and consequent destitution and want. There is not the slightest intimation that such care was to be exercised in the interest of any other beneficiary.

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Opinion of the Court.

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No provision is made in favor of the nephews or any other person, after the estate should have vested in the widow. The clause last quoted is immediately followed by the words: "She is, by this gift, free from all restraint to do as may seem to her best and proper." The testator had previously left her "free from all restraint" in the discharge of her duties as executrix of his will. She was to be free from all restraint in the settlement of the estate, and she was left free from all restraint to do with the subject of the "gift" as might, in her discretion, seem best and proper. No desire or even recommendation is expressed that she should make any disposition of any part of the proceeds of the estate to or for the nephews, or to any other person or use, or the expression of a desire that they should have a claim on her bounty or generosity. It is difficult to imagine that there is here any precatory words employed expressing a wish that the nephews should receive any portion of the estate of the testator after it became vested in the first devisee, or that they should become the objects of her bounty. "Where there is an absolute power of disposal, with the confidence expressed that the donee will dispose of the property according to the testator's wishes, where none are expressed, there is no trust." (Theobold on Law of Wills, 380, and cases cited.) There is no limitation expressly creating a life estate in the wife of the testator. Nor is there a limitation over for the benefit of the nephews, either express or that arises by implication from the language employed. (*Hamlin v. United States Express Co.* 107 Ill. 448.) By the first clause of the will, the absolute estate in the property is devised to the wife, and, apparently to prevent any mistake or misapprehension arising from the clause inserted in respect of the disposition of the estate upon her death before final settlement, she is, by the last clause, given absolute dominion and control over it. She is freed from all restraint in the use of the gift, or in doing with it as she should see proper. In other words, she was first given the property absolutely and

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Syllabus.

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in fee, upon the happening of the event of a settlement of the estate during her life, and then, upon the contingency of its vesting in her, she is left "unlimited and unfettered" in the dominion, control and disposition of the estate. The case clearly falls within the rule announced by the authorities cited, and the principal devisee, the wife of the testator, upon the settlement of the estate, took absolutely the property remaining. We are not justified in creating a limitation upon the devise to the wife, by construction; nor, in our opinion, does any such limitation arise by implication from the language of the will.

We are of opinion that the circuit court decided correctly, and that its decree should be affirmed, which is accordingly done.

*Decree affirmed.*

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ELIZABETH KIRCHOFF

v.

THE UNION MUTUAL LIFE INSURANCE COMPANY.

*Filed at Ottawa April 3, 1889.*

128	199
128	207
135	639
128	199
39	98
128	199
59a	313
128	199
181	364
53a	548
128	199
183	142

1. **APPEAL—whether a freehold involved—what is meant by the word "freehold."** The word "freehold," as used in the statute relating to appeals and writs of error, is used in the sense as defined by the common law. It does not include a mere right to do that which in equity will entitle a party to a freehold.

2. **SAME—on bill to redeem.** On a bill seeking to have a deed for land absolute on its face declared a mortgage, and a right of redemption therefrom allowed, no freehold is involved, and hence no appeal lies from the decree therein directly to this court.

3. The mere fact that a complainant prays that the defendant be decreed, among other things, to convey certain real estate to the former, does not determine that a freehold is involved. That can be determined only by the allegations of the bill showing what the complainant is entitled to have decreed.

4. A bill seeking the specific performance of an agreement of an insurance company to allow the mortgagor, after foreclosure and a con-

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Opinion of the Court.

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veyance of his equity of redemption in discharge of the mortgage debt, to redeem a part of the premises at its appraised value, in ten equal annual installments, but which fails to show any agreement on the part of the company to reconvey before full payment of the redemption money, involves no freehold. The only decree the complainant could have, if any, would be that he be allowed to redeem, and before redemption he would not be entitled to a deed, even in equity.

APPEAL from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. W. S. HERBERT, and Mr. GEORGE R. DALEY, for the appellant.

Messrs. SWETT & GROSSCUP, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This appeal must be dismissed. It should have been taken to the Appellate Court for the First District, and it is therefore improperly here. The bill seeks a decree declaring a certain deed, absolute on its face, to be but a mortgage, and that appellant be allowed to redeem from it, as such.

The material allegations of the bill, so far as they are necessary to show the character of the question involved, are as follows: "That on or about the 8th day of May, 1871, complainant, together with her husband, Julius Kirchoff, and her mother, Angela Diversey, borrowed of the Union Mutual Life Insurance Company the sum of \$60,000, and, to secure the payment thereof, executed their promissory note for said sum, payable to said company, and also a trust deed, to Levi D. Boone, as trustee, on a large amount of property, including lots 2 and 4, in block 21, of the Canal Trustees' subdivision of the south fractional quarter of section 3, township 39, north, range 14, east of the third principal meridian, being situated in the city of Chicago; that some time during the year 1878, default having been made in the payment of said indebtedness, the said company instituted proceedings for the foreclosure of

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Opinion of the Court.

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said trust deed; that thereupon complainant, through her said husband, as her agent, offered said company to release and quitclaim to said company all her lands in said trust deed described, provided said company would allow her to redeem said two lots hereinbefore described, one of which said lots was occupied by her as a homestead, upon payment of whatever sum the said lots, with the improvements thereon, should be valued at by an appraiser to be agreed upon by said company and complainant, and upon such terms of payment as said company were, at or about that time, offering to purchasers of its real estate, to-wit, in ten equal annual payments or installments, with interest, until paid, at the rate of six per cent per annum, and to secure the payment of such installments by a mortgage or trust deed upon said lots; and provided, also, that said company would take the lands in said trust deed described, belonging to appellant, in full satisfaction of the indebtedness held by it against herself and husband; that said company accepted said offer, and agreed to allow such redemption by complainant upon the terms and for the consideration aforesaid." It is further alleged, that a valuation was made of the two lots at \$7500, and then follows this allegation: "That thereafter, upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed and prior to the agreement hereinbefore set forth, for such redemption by your oratrix, and it was thereupon represented to your oratrix by said company, through its attorney, that it would be necessary to foreclose said trust deed in order to make good title in said company to said lots of land before it could take a mortgage thereon for said installments of redemption money, and it was thereupon agreed by and between said company and your oratrix that the agreement for said redemption should not be executed until after the title had been perfected in said company by said foreclosure proceedings, but should be held in abeyance until after such

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Opinion of the Court.

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foreclosure proceedings should be completed and the title to said lots become vested in said company discharged of such incumbrances, etc., but that in the meantime your oratrix should execute and deliver to said company her deed of release and quitclaim, as agreed upon, and should interpose no defense to such foreclosure proceedings." It is then alleged that complainant or her husband "executed, acknowledged and delivered to said company a deed of release and quitclaim of all and singular the land and premises belonging to your oratrix, described in said trust deed, including the said two lots hereinbefore specifically described, in and by which said deed it was, in effect, stipulated by your oratrix that said deed should not be construed to affect the right of said company to foreclose said trust deed." It is further alleged that the company thereupon prosecuted its suit in the Circuit Court of the United States for the Northern District of Illinois, for the foreclosure of said trust deed; that decree of foreclosure was entered, sale of lots made pursuant thereto, and that at such sale the insurance company became the purchaser of all the property, including the said lots 2 and 4, and a master's deed was subsequently made; that a receiver was appointed, and a writ of assistance issued to put him in possession of the lots; that complainant resisted said order, and set up her aforesaid agreement with the company, but the company wholly disregarded its agreement and procured the court to issue the writ of assistance, whereby complainant and her husband were compelled to vacate their homestead. It is also further alleged that the insurance company refuses to carry out its agreement with complainant, and claims to own said lots in fee, free of any equitable interest of the complainant therein, and that complainant "has always been and is now ready and willing to keep and perform the whole of said agreement on her part to be performed, but has been prevented by said company from so doing." The prayer is, that the insurance company "may be compelled, by the decree of this court, specifically to per-

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Opinion of the Court.

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form the said agreement with your oratrix, and convey to her the said two lots," etc. The answer of the company denies every allegation in respect to the agreement to allow the complainant to redeem.

The mere fact that complainant prays that the defendant be decreed, among other things, to convey to her, does not determine that a freehold is involved. That can only be determined by the allegations of the bill, showing what she is entitled to have decreed. Divested of unnecessary verbiage, the allegations here simply amount to this: that it was agreed between the parties that the complainant be allowed to redeem from the sale of lots 2 and 4 by paying to the insurance company the valuation to be placed upon them, in the manner indicated, in ten equal annual payments or installments, with interest, until paid, at six per cent per annum. There is no allegation that the company agreed that it would convey before redemption should be made, and therefore, if the complainant were to have a decree to all that she shows herself to be entitled, it could only be that she be allowed to redeem pursuant to the terms of the agreement. Until redemption, she would have no right, even in equity, to a deed; but undoubtedly, after redemption, she would have such right, and it would be enforced by a court of equity.

We have recently held, (*Lynch v. Jackson et al.* 123 Ill. 360, *Hollingsworth v. Koon et al.* 113 id. 443,) that the question of the right to redeem under a conveyance claimed to be a mortgage, does not involve a "freehold," within the meaning of that word as used in section 88 of the amended Practice act. (2 Starr & Curtis, chap. 110, p. 1842.) Unfortunately, our rulings have not been entirely harmonious as to what is meant by "involving a freehold," as that term is used in the section referred to above; but without deeming it necessary to review the several cases, we think it may be said, that where the question has been considered by the court and decided, the decision has, in general, (though there has been one exception,

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Syllabus.

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and perhaps more,) proceeded upon the understanding that the word "freehold" means as that word was known to and defined by the common law, and that it does not include the mere right to do that which, in equity, will entitle a party to a "freehold." See *Land Co. et al. v. Peck et al.* 112 Ill. 432; *Chicago, Burlington and Quincy Railroad Co. v. Watson et al.* 105 id. 220; *McIntyre v. Yates et al.* 100 id. 475.

Believing that this is a fairly warranted construction of the statute, and that it will subserve the ends of justice in marking the boundary of the jurisdiction of the Appellate Court, as well as any other rule that might be adopted in that respect, it will be adhered to; and this necessitates a dismissal of this appeal, which is accordingly ordered.

*Appeal dismissed.*

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183 204  
183 189

CILFTON H. MOORE, Admr.

v.

PETER T. SWEENEY, Admr.

*Filed at Springfield April 5, 1889.*

1. **APPEAL—from Appellate Court—whether it will lie.** When a case determined in the Appellate Court does not involve either a freehold, a franchise or the validity of a statute, and the record contains no certificate of the judges of that court that it involves questions of law of such importance, on account of principal or collateral interests, that it should be passed upon by this court, and the amount involved is less than \$1000, no appeal will lie from the judgment of the Appellate Court.

2. The administrator of a deceased widow had appraisers appointed to appraise her deceased husband's estate, who appraised the property left by the husband at \$32.75, and fixed the widow's award at \$700. The administrator of the widow's estate selected the personal property, and elected to take the residue (\$667.25) in money, which was allowed against the husband's estate as a second class claim. On appeal to the circuit court this claim was disallowed, and this judgment was affirmed by the Appellate Court: *Held*, that as the amount involved was less than \$1000, and no certificate of importance was given, no appeal lay from the judgment of the Appellate Court.

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Brief for the Appellant.

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APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of DeWitt county; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. MOORE & WARNER, for the appellant:

The court erred in refusing to mark as either "held" or "refused," the written proposition of law submitted by appellant. Rev. Stat. chap. 110, sec. 42; *Calef v. Thomas*, 81 Ill. 478; *Kepperly v. Ramsden*, 83 id. 354; *Farwell v. Shove*, 105 id. 61; *Sexton v. Chicago*, 107 id. 323; *Hardy v. Rapp*, 112 id. 359; *Barber v. Hawley*, 116 id. 91; *Kelderhouse v. Hall*, 116 id. 147; *Benefit Aid Association v. Hall*, 118 id. 169.

The question attempted to be raised by appellee in this proceeding, as to whether the appellant, as administrator of the estate of the deceased widow of Isaac Loucks, was entitled to have her widow's award estimated and set off to him, as such administrator, out of the estate of her deceased husband, having been prior to this appeal decided in favor of appellant by the county court, from which decision appellee prosecuted an appeal to the circuit court, where the judgment of the county court was affirmed, and from which last decision appellee failed to take an appeal, is *res judicata*. *Bowen v. Allen*, 113 Ill. 53; *Umlauf v. Umlauf*, 117 id. 580; *Garrick v. Chamberlain*, 97 id. 620; *Cemetery Co. v. McCrea*, 92 id. 619; *Railroad Co. v. Peterson*, 115 id. 597; *Newberry v. Blatchford*, 106 id. 584; *Knowlton v. Hanbury*, 117 id. 471; *Attorney General v. Railroad Co.* 112 id. 520; *Bennitt v. Mining Co.* 119 id. 9.

The widow's failure to renounce the benefit of the provision in her husband's will does not defeat her right to the widow's award. Rev. Stat. chap. 3, sec. 76; *Deltzer v. Scheuster*, 37 Ill. 301.

The widow's award is an exemption, and her right to it is vested in her by the law immediately upon the death of her husband. *Miller v. Miller*, 82 Ill. 467; *York v. York*, 38 id. 522; *McCord v. McKindley*, 92 id. 11; *People v. Bradley*, 17 id. 485.

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Brief for the Appellee. Opinion of the Court.

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That portion of a widow's award which is chosen in money is a demand against the estate of her deceased husband, and the sale of realty may be resorted to for its satisfaction. *Rector v. Reavill*, 3 Bradw. 232; *Deltzer v. Scheuster*, 37 Ill. 301.

The administrator of a deceased widow may recover the value of his intestate's award. *York v. York*, 38 Ill. 522.

There was no *laches* on the part of appellant or his deceased intestate that will prejudice his or her right to the award. *Furlong v. Riley*, 103 Ill. 628.

Mr. P. T. SWEENEY, for the appellee:

The refusal of the court to hold the proposition of law asked, worked no prejudice to the appellant, and is, therefore, no cause for a reversal.

The widow was not a creditor of her husband's estate until her relinquishment of her right to take the specific articles given her by the statute, and her election to take in money. (*Cruce v. Cruce*, 21 Ill. 46.) This election must be made in her lifetime. Having taken all the property as devisee and legatee, her administrator is estopped from claiming her award after her death. Having sold the land and received its proceeds, she could not, if living, subject it to the payment of her award.

The order of the court appointing appraisers was not an adjudication of the rights of the widow. That could not arise until the presentation of her claim for allowance.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This case comes here on appeal from a judgment of the Appellate Court, and the appellee moves to dismiss the appeal on the ground that less than \$1000 is involved. It is clear that the case involves neither a franchise or freehold or the validity of a statute, and the record contains no certificate of the judges of the Appellate Court that the case involves ques-

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Opinion of the Court.

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tions of law of such importance, on account of principal or collateral interests, that it should be passed upon by this court. If then less than \$1000 is involved the appeal must be dismissed as being unwarranted by the statute. The facts are briefly these:

On the 25th day of June, 1879, Isaac Loucks died in Clinton county in this State, leaving a will by which he devised and bequeathed all his property to Larney Loucks his widow, and appointed her his sole executrix, requesting that she be not required to give bond or file an inventory. The property left by the testator consisted of household furniture worth about \$50 and the premises occupied by him as a homestead of the value of about \$300. On May 15, 1882, the widow presented the will to the county court and it was admitted to probate, but she never took out letters testamentary. On the same day she mortgaged the homestead lot by an incorrect description to one Bishop to secure the payment of \$179.80, and on the 28th day of June following she conveyed it absolutely by a correct description to one Rasbach, who afterward conveyed it to one Lewis. Having also converted to her own use all the personal property without taking further steps in the administration of the estate, she removed to the State of New York, and there died about April 15, 1884.

In December, 1884, on petition of appellee, a creditor of Isaac Loucks, letters of administration with the will annexed were granted by the county court of DeWitt county to John J. McGraw, and appellee's claim for \$501 having been presented and allowed, a petition was filed for leave to sell said real estate for its payment, Bishop and Lewis and Lewis' tenant then in possession being made parties defendant. Said petition was dismissed by the county court, but on appeal to the Circuit Court the order of dismissal was set aside and an order of sale entered in accordance with the prayer of the petition. This latter order was affirmed on appeal by the Appellate Court. Bishop then procured the appointment of the appel-

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Opinion of the Court.

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lant as administrator of the estate of Larney Loucks, the letters of administration being issued March 4, 1886. About this time McGraw died, and the appellee being appointed administrator *de bonis non* in his place, sold the homestead under the decree of the Circuit Court to one Edward J. Sweeney for \$260, and made report of the sale to the Circuit Court, which was approved.

Proceedings were then taken by appellant as administrator of Larney Loucks to have appraisers appointed to appraise the estate of Isaac Loucks and to set off and allow to him as such administrator the widow's award in the last named estate or the value thereof. Such proceedings were thereupon had in the county court that appraisers were appointed who appraised the personal property belonging to said estate at \$32.75, and fixed the amount of the widow's award at \$700. This award having been approved by the County Court, the appellant selected the personal property inventoried at its appraised value, and elected to take the residue, viz., \$667.25, in money. Judgment was thereupon entered in his favor for that amount, as a claim of the second class, to be paid in due course of administration. On appeal to the Circuit Court that judgment was reversed, and a judgment entered disallowing said claim. On appeal to the Appellate Court the judgment of the Circuit Court was affirmed, and the judgment of the Appellate Court is brought here for review.

The only question involved in the case is the right of the appellant to the balance of the widow's award not satisfied by the personal property selected, such balance being only \$667.25. The appeal to this court therefore was taken without authority of law, and it must be dismissed.

*Appeal dismissed.*

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Syllabus. Brief for the Appellant.

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WILLIAM J. BROWNELL

v.

ELISHA B. STEERE.

128	209
166	480
128	209
173	577
71 <sup>a</sup>	177
128	209
79 <sup>a</sup>	469
128	209
188	480

*Filed at Springfield April 5, 1889.*

1. **PARTNERSHIP—compensation to partner for services.** One partner can not charge the firm or his co-partner for his services in attending to the partnership business, unless there is a special agreement among the partners entitling him to do so.

2. **SAME—reimbursing partner for expenses in defending suit.** After the dissolution of a partnership a former clerk sued the firm for his services, and recovered judgment therefor. One of the partners defended the suit, and paid out certain moneys for costs and attorney's fees, which were not shown to be excessive or unnecessary: *Held*, that the amounts so paid were properly charged to the firm in stating the partnership account.

3. **SAME—sale of partnership stock to one of the partners—action of arbitrators.** On the dissolution of a firm an invoice of the stock on hand was taken, and it was agreed that arbitrators should offer the stock for sale to the two partners, and that the one bidding the larger amount should take the goods, and the price bid should be treated in the settlement of the partnership account the same as the goods, and the matter of the settlement was referred to the arbitrators. Their award was set aside: *Held*, on bill to adjust the partnership matters, that the setting aside of the award did not operate to vacate the sale, and that the purchaser was properly charged with the amount of his bid for the goods.

4. **SAME—interest—as between partners.** Interest is not allowable on the settlement of partnership accounts, where no unreasonable delay or improper use of the partnership funds is shown.

**APPEAL** from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

**Mr. JOHN E. POLLOCK**, for the appellant:

There is no inflexible rule of law that one partner shall not recover for extraordinary services without an express agreement therefor. *Lewis v. Moffett*, 11 Ill. 399.

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Brief for the Appellee.

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An agreement to pay one partner for services may be implied from the circumstances of the case. *Bradford v. Kimberly*, 3 Johns. Ch. 451; *Emerson v. Durand*, 64 Wis. 118; *Caldwell v. Lieber*, 7 Paige, 483; *Levi v. Kerrick*, 13 Iowa, 344; *Godfrey v. White*, 43 Mich. 171; *Cramer v. Bachman*, 68 Mo. 310; *Marsh's Appeal*, 69 Pa. St. 35; *Reynolds v. Mardis*, 17 Ala. 72; *Moritz v. Perbles*, 4 E. D. Smith, 135; Story on Partnership, (3d ed.) 293.

The award of the arbitrators having been set aside, the submission should also fall with it. Morse on Arbitration, 456; *Steere v. Brownell*, 113 Ill. 415; *Alfred v. Railroad Co.* 92 id. 609.

The decree improperly states the account between the parties.

Exceptions to the master's report wherein he allowed interest to Steere, were properly sustained. *Sammis v. Clark*, 13 Ill. 544; *Hitt v. Allen*, id. 592; *McCormick v. Elston*, 16 id. 204; *Aldrich v. Dunham*, id. 403; *Railroad Co. v. Cobb*, 72 id. 152; *Newland v. Shafer*, 38 id. 379; *Daniels v. Osborne*, 75 id. 615; *Jassoy v. Horn*, 64 id. 379; *Davis v. Kenaga*, 51 id. 170; *Chapman v. Burt*, 77 id. 337; *Devine v. Edwards*, 101 id. 138; *Beddell v. Janney*, 4 Gilm. 193.

Messrs. KERRICK, LUCAS & SPENCER, for the appellee:

In the absence of a special agreement to that effect, a partner can not have compensation for his services in and about the firm business. *Roach v. Perry*, 16 Ill. 37; *Thornton v. Thornton*, 1 Austr. 94; *Hanks v. Baber*, 53 Ill. 292; *Askew v. Springer*, 111 id. 663; *Kimball v. Lincoln*, 5 Bradw. 322; *Strattan v. Tabb*, 8 id. 227; *Fover v. Fover*, 29 Gratt. 134; *Randall v. Richardson*, 53 Miss. 176; *Brown's Appeal*, 89 Pa. St. 147; 2 Lindley on Partnership, 774; Bates on Partnership, sec. 770; Collyer on Partnership, sec. 183; Parsons on Partnership, 130; Strong on Partnership, 182.

Setting aside the award did not set aside the sale of the goods. The contract of sale was not affected thereby.

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Opinion of the Court.

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The court erred in refusing to charge the appellant with interest. Bates on Partnership, sec. 786.

An agreement for interest is implied from a usage crediting interest on the books before and after the time in question. *Miller v. Craig*, 6 Beav. 433; *Pratt v. Holton*, 11 La. Ann. 260.

Interest should always be charged against a partner who unnecessarily delays accounting, or who uses the partnership funds about his own business. *Derby v. Gage*, 38 Ill. 27; *Ligare v. Peacock*, 109 id. 94; *Stroughton v. Lynch*, 1 Johns. Ch. 467; *Johnston v. Hartshorne*, 52 N. Y. 177; *Broling v. Dobyns*, 5 Dana, 434; *Honore v. Comesnil*, 7 id. 199; *Taylor v. Young*, 2 Bush, 428; *Dunlap v. Watson*, 124 Mass. 305; *Crabtree v. Randall*, 133 id. 552; *Wells v. Babcock*, 56 Mich. 276; *Dimond v. Henderson*, 47 Wis. 172; Bates on Partnership, sec. 788; 2 Lindley on Partnership, 977.

**Mr. JUSTICE MAGRUDER** delivered the opinion of the Court:

This case is now before us for the second time. Our former decision of it is reported as *Steere v. Brownell*, 113 Ill. 415. The main facts are there stated and it is not necessary to repeat them here. After the reversal of the cause and its reinstatement in the Circuit Court, it was referred to a master to state an account between the partners. The hearing was had upon exceptions to the Master's report, all of which were overruled, except two, and a decree was rendered by the Circuit Court in favor of appellee Steere, who was complainant below, and against appellant, the defendant below. This decree has been affirmed by the Appellate Court, and is brought here by appeal from the latter court.

Appellant and appellee, during their partnership, under the firm name of W. J. Brownell & Co., from January, 1877, to January, 1882, had in their service a man by the name of John P. McLean. McLean was book-keeper, salesman, buyer and chief clerk in the store, which was a retail boot and shoe

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Opinion of the Court.

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store in Bloomington. Appellee furnished one half the capital, but he devoted but little time or attention to the business, leaving its management to appellant, who furnished the other half of the capital.

In stating the account, the Master charged McLean's salary for the five years to the firm, thus compelling each partner to pay half of it. Appellant claims that the whole of such salary should have been charged to appellee, and that he, appellant, should not have been required to pay any of it. This claim has its basis in the fact, that appellant managed the business, while appellee gave it but little attention, and the allowance of such claim would be tantamount to giving appellant extra compensation for his services in behalf of the firm. It is well settled, that one partner can not charge the firm, or his copartners, for his services in attending to the partnership business, unless there is a special agreement among the partners entitling him to do so. (*Roach v. Perry*, 16 Ill. 37; *Hanks v. Baber*, 53 id. 292; *Askew v. Springer*, 111 id. 662.) In the present case appellant sought to establish such an agreement by parol testimony. The lower courts found against him upon this point, and we are not prepared to say, that their finding is not sustained by the evidence.

In January, 1877, one Rugg was doing a boot and shoe business in Bloomington. He failed, and his stock, which was sold at sheriff's sale, was purchased by appellant and appellee, who stepped into Rugg's place and continued the business at the same stand. McLean had been clerk for Rugg and continued to act for the new firm. Appellant swears, that appellee said he would pay McLean the same wages which Rugg had been paying him. One Richardson swears, that he heard appellee say, that McLean represented his, appellee's, interest in the firm. M. D. Sliter also testifies, that he heard McLean say, that the latter was representing Steere's interest. On the other hand, appellee swears positively that he made no agreement to pay McLean's salary. McLean also testifies that he

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Opinion of the Court.

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knew of no such agreement, and that he was never told by either Brownell or Steere, that the latter was to pay his salary. During the five years of the existence of the firm, McLean paid himself monthly out of the monies of the partnership without objection or complaint by appellant. Many other circumstances, disclosed by the record, tend to show that McLean was always regarded as the employee of the firm, and not exclusively of Steere, until a few days before the dissolution in 1882 when appellant charged the account to appellee.

Appellant further complains that, in the accounting, the Master charged him with the price he paid for the stock at the sale of it, and not with the actual value of the stock, which is claimed to have been only from 65 to 75 cents upon the dollar of the invoice price. By reference to *Steere v. Brownell, supra*, it will be seen that, by the agreement, dated January 3, 1882, the firm was dissolved, the store was to be closed, an invoice was to be taken of the stock on hand, and the three arbitrators were to "immediately offer such stock for sale to the said Steere and Brownell and \* \* \* sell it to the one, who shall offer the largest per cent on the said invoice price; and upon the payment to such arbitrators of one half of such bid, said arbitrators shall deliver the stock to such purchaser," etc. The invoice was made and the goods were offered for sale. Each party bid. Appellee's last bid was \$1.03; appellant bid \$1.04; the stock was sold to him, and he took possession. It is said, that, inasmuch as the award has been set aside, the part of the agreement, thus providing for a sale, was also set aside, and, consequently, that appellant should not be charged upon the basis of his bid, that is to say, \$1.04, but upon the basis of the actual value of the stock as above stated.

The setting aside of the award did not set aside the sale. The sale was no part of the award; it was to be made before the arbitrators proceeded to a hearing. Appellee, having bought the stock, could dispose of it, before the arbitrators

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Syllabus.

rendered their decision. The price, at which the property was sold, was to be treated, in making the award, as the stock would have been treated if there had been no sale. We do not think that the accounting was erroneous in the respect here indicated.

After the dissolution McLean sued the firm for the balance due him on his salary and recovered judgment. Appellant defended the suit, and paid out certain monies for costs and attorneys' fees. These amounts were charged to the firm, and, we think, such charge was proper. They were expended for the benefit of the firm, and are not shown to have been excessive or unnecessary.

The Circuit Court disallowed a charge against appellant for interest, and appellee assigns such disallowance as cross-error. We do not think there has been any such delay in accounting, or any such improper use of partnership funds as to entitle the appellee to charge appellant with interest.

Several other minor points are urged upon our attention, but after a careful consideration of the whole record, we think justice is done by the decree of the court below.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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TILFORD T. SHOOT

v.

CARRIE C. GALBREATH.

*Filed at Springfield April 5, 1889.*

198	214
176	78
128	214
185	609
128	214
190	175

1. **DOWER—right of the widow—generally.** Under the statute of 1845, and also under the present statute, upon the death of the husband, dower in the wife becomes consummate in all cases when he dies intestate; and the question as to what class of heirs he leaves, or, in fact, whether he leaves heirs or not, is of no consequence. Should the fee be disposed of to others, either by the Statute of Descents or by a sale

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Brief for the Plaintiff in Error.

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to pay debts, this dower right continues to exist, and can only be divested by the voluntary act of the widow.

2. *SAME—merger of dower right in a larger estate.* Should the widow, however, become the owner of land in fee, or any part of it, her dower, as in other cases where a greater and lesser estate unite in the same person, is merged in the fee, and, of course, can not be asserted.

3. *SAME—in case of death of husband without issue.* Since the Statute of Descents of 1872, and the Dower act of 1874, as was the rule under the act of 1845, should the husband die without leaving lineal descendants, his widow will take, as heir, one-half of his lands, and will be entitled to dower in the other half thereof.

4. *SAME—relinquishment of dower—effect of widow making deed as administratrix.* A widow, who in her capacity as administratrix makes a deed for lands of her deceased husband sold under a decree of court to pay debts, does not thereby relinquish her dower in such land, unless it is so specified in her deed, or she makes statements or does acts calculated to mislead the purchaser.

5. *SAME—damages for non-assignment of dower—requisites of the bill—time to object.* A widow is entitled to damages for the non-assignment of dower from the time of the filing of her bill for dower, that being, in law, a demand. The damages, however, should be claimed in the bill, by amendment or otherwise. But when both parties offer evidence on the question of damages, without objection, in the court below, the objection that the bill makes no such claim comes too late when made for the first time in this court.

WRIT OF ERROR to the Circuit Court of Coles county; the Hon. JAMES F. HUGHES, Judge, presiding.

Messrs. CONNOLLY & MATHER, and Mr. A. J. FRYER, for the plaintiff in error:

The statute of 1845 expressly saved to the widow her dower, which is not the case in the revision of 1874.

It would seem that the legislature, by giving one-half of the real estate and all the personalty to the widow, and by express language vesting the other half in the next of kin, intended that the same should thus descend without incumbrance of dower, or else it would have been reserved, as in the law of 1845.

Under the sixth clause of the Statute of Descents the widow takes the entire estate. How could it be claimed in that case

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Brief for the Defendant in Error.

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that if the lands were sold to pay debts she would still be entitled to dower? Not at all. The lesser estate would be merged in the larger. So in the case of her taking one-half. Such widows must do as other heirs. They must first pay the decedent's debts before taking anything.

The decree is erroneous in awarding execution against the plaintiff in error for the amount found as rent. There was no claim for rent in her bill for dower.

Defendant in error sold the premises at public sale without making any claim of dower, and should be estopped from now asserting such claim.

Messrs. WILEY & NEAL, for the defendant in error:

There can be no possible question about what the law was prior to 1872, when there was a surviving widow and no child or children, or descendants of child or children. The widow took one-half of the land in fee and dower in the other half. *Tyson v. Postlethwaite*, 13 Ill. 727; *Tyler v. Tyler*, 19 id. 151; *Cross v. Carey*, 25 id. 564; *York v. York*, 38 id. 522; *Brown v. Pitney*, 39 id. 468; *Sutherland v. Sutherland*, 69 id. 481.

The change in 1872 consisted in dropping the words, "saving to the widow, in all cases, her dower, as provided by law."

It is true that defendant's fee simple right vests only after debts are paid; but we can not agree with the attorneys for plaintiff in error that her dower interest is in abeyance until then. It has never been held, where the common law is in force, that creditors could sell the dower of a widow, and we do not imagine it ever will be so held until the legislature so enacts in unmistakable language.

In *Cool v. Jackman*, 13 Bradw. 561, Mr. Justice BAKER, in the opinion of the court, says: "So far as concerns the wife, the right of dower is the same under our present statute that it was at the time of the marriage and under the statute of 1845. The widow then was and now is endowed of the third part of all the lands whereof the husband was seized of an es-

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Opinion of the Court.

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tate of inheritance at any time during the marriage, unless the same had or has been relinquished in legal form."

It is further claimed that the decree is erroneous in awarding appellee damages for non-assignment of dower, when the bill did not claim any such damages. Section 41, chapter 41, entitled "Dower," Starr & Curtis' Statutes, expressly provides that complainant shall be entitled to recover such damages, and that execution may issue therefor. As to the point that there is no prayer for such damages in the bill, it was only after the filing of the bill that complainant was entitled to any damages, there being no evidence in the record that there was any demand for assignment of dower prior to filing the bill. Bringing suit for dower is deemed a valid demand. *Bonner v. Peterson*, 44 Ill. 253.

It is further claimed that defendant in error sold the premises at public sale without making any claim or giving notice of any claim of dower, and that the purchaser paid a fair price for the premises as unincumbered. There is no evidence that he paid any more than the premises were worth subject to dower. And he was bound to know the law, and to know that unless dower was released, defendant had her dower in said premises.

The claim of estoppel is fully answered by section 46, chapter 41, of Starr & Curtis' Statutes, which is as follows: "No person who sells and conveys lands by order of court, for the payment of debts, shall be deemed to have relinquished, by reason of such conveyance, any right of dower which he or she may have in such lands, unless his or her relinquishment is specified in the deed or conveyance."

Mr. JUSTICE WILKIN delivered the opinion of the Court:

On the 9th of February, 1887, defendant in error filed her bill in chancery, against plaintiff in error, in the Coles circuit court, for the assignment of dower, and on the 15th of May, 1888, obtained a decree for one-third part of the premises de-

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Opinion of the Court.

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scribed in her bill, as and for her dower, and the sum of \$45 as damages for the non-assignment thereof, with an order that in default of payment of said damages within twenty days, execution should issue for the same. By the same decree commissioners were appointed to assign the dower. From that decree this writ of error is prosecuted, and a reversal insisted upon, because, as is said, defendant in error has no dower rights in the premises, and because, on the issues, the court below could not legally assess damages and order execution therefor.

The material facts are admitted. Defendant in error and William B. Galbreath were married June 1, 1885. He died October 1 thereafter, leaving her surviving him, and also his parents and several collateral relatives, but no lineal descendants. During the marriage the husband was seized in fee, and owned at the time of his death, real estate situated in Coles county, a part of which is described in this bill. Defendant in error and A. J. Fryer, Esq., were duly appointed administrators of his estate, and in June, 1886, obtained from the county court of said county a decree to sell real estate to pay debts theretofore probated and allowed against the same. In pursuance of this decree, the lands involved in this suit were sold to plaintiff in error, and an administrator's deed executed therefor without relinquishment of the widow's dower. Plaintiff in error went into possession, and held the same, enjoying the rents and profits from and after the filing of this bill, to the rendition of said decree. Other lands of said estate remained, after the payment of all debts, of the value of \$8000, out of which the widow received as heir some \$3000.

It is first insisted, on behalf of plaintiff in error, that inasmuch as the deceased husband left no child or children, or descendants thereof, and by the statute of this State in such case, after the payment of his debts, one-half of his real estate and the whole of his personalty descended to his widow as an absolute estate forever, she is entitled to no dower in this land,

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Opinion of the Court.

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—or, more succinctly stated, the proposition sought to be maintained is, that the widow of a husband dying intestate without lineal descendants, is not, under our statute, entitled to dower in any of the lands of which her husband was seized during the marriage. Under the statute of 1845, it was often held that the widow of a husband so dying was entitled to dower in the half of the real estate of which he was seized during the marriage which she did not inherit, and these decisions must be accepted as decisive of the question here raised, unless it shall appear that the legislature intended to adopt a different rule by the statute of 1872, now in force. The two statutes are not materially different, except that the 46th section of the statute of 1845, entitled "Wills," (which defined the rights of a widow when there was no child or children,) contained the clause, "saving to the widow, in all cases, her dower, as provided by law," whereas the present Statute of Descents (to which the foregoing subject is transferred) is silent as to dower. The omission, "saving to the widow," etc., in the statute of 1872, it is contended, shows an intention on the part of the General Assembly to change the law of dower in such cases as it existed under the former statute. The Dower act passed in 1874, now in force, provides that a surviving wife shall be endowed of the third part of all the lands whereof the deceased husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form. If it could be said that this statute, and the Statute of Descents passed in 1872, are in conflict, the Dower act, being the latest expression of the legislative will, would control, and give the widow the same dower rights which she had under the statute of 1845. There is, however, no conflict in these statutes. As before said, the Statute of Descents is silent on the subject of dower. The Dower act expressly gives the widow dower in *all* the lands whereof the husband was seized, etc., and hence, by giving effect to the language of both statutes, the dower right attaches to the half not descending to the

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Opinion of the Court.

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widow, as clearly as though the clause in the 46th section of the Statute of Wills of 1845 had been retained.

As no difficulty was found in giving practical effect to the statute of 1845, none, we apprehend, will be encountered in carrying out the construction here given to the present law. Under both statutes, upon the death of the husband, dower in the wife becomes consummate, in all cases when the husband dies intestate, and the question as to what class of heirs he leaves, or in fact whether he leaves heirs or not, is of no consequence. If the fee is disposed of to others, either by the Statute of Descents or by sale to raise assets to pay debts, this dower right continues to exist, and can only be divested by the voluntary act of the widow. If she becomes the owner of the land in fee, or any part of it, her dower, as in other cases where a greater and lesser estate meet in the same person, is merged in the fee, and, of course, can not be asserted.

To hold, as is contended, that because, under the third clause of section 1 of the Statute of Descents, a widow *may* become the owner in fee of one-half, or, under the sixth clause, of the entire estate, therefore, whether she does in fact become such owner or not, she shall, in such case, have no right of dower, would in many cases deprive her of all means of support from the real estate of her deceased husband. However much real property he might die seized of, if all should be required to pay debts the widow would receive nothing. The debts of the husband may, and often do, in such cases, defeat the wife's claim to any portion of the real estate in fee, but they can not affect her right of dower. Of that right she can only be deprived by her own voluntary relinquishment in legal form. We hold that the decisions made under the statute of 1845 are equally applicable to the present law, and are decisive of appellee's right to dower in the lands in question.

It is said, however, that inasmuch as the widow in this case joined with her co-administrator in making a sale and execut-

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Opinion of the Court.

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ing an administrator's deed for these premises without making any claim, or giving any notice of a claim, to dower therein, she should now be estopped from asserting such right, even though it did exist. Section 46, chapter 41, entitled "Dower," provides: "No person who sells and conveys lands by order of court, for the payment of debts, shall be deemed to have relinquished, by reason of such conveyance, any right of dower which he or she may have in such lands, unless his or her relinquishment is specified in the deed or conveyance." It is not pretended that any statements were made by the widow, or any acts done by her, calculated to deceive or mislead plaintiff in error, and he must therefore be held to have purchased subject to all the legal rights of defendant in error.

The damages allowed were one-third of the rental value of the premises for one year, less taxes paid by plaintiff in error. We do not understand counsel for plaintiff in error to contend that defendant in error is not entitled to damages for the non-assignment of dower from the time the bill was filed, (which in law is a sufficient demand,) if she is lawfully entitled to dower, nor that the amount allowed by the court is not equitable and just. The error complained of is the allowance of damages, none being claimed in the bill. Correct practice would no doubt have required complainant below to have amended her bill so as to claim damages, and make it conform to the evidence, but inasmuch as both parties introduced evidence on the hearing as to the rental value, without objection, and plaintiff in error showed the taxes paid by him, all of which testimony was introduced on the question of damages, and was competent for no other purpose, we think that the parties voluntarily submitted that issue to the court. The objection that no claim for such damages was made in the bill, being urged for the first time in this court, comes too late.

*Decree affirmed.*

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Syllabus.

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**ANTHONY W. WOODWARD *et al.***

v.

**JOSIAH D. BROOKS *et al.***

*Filed at Ottawa April 3, 1889.*

**1. PARTNERSHIP—death of one of the partners—retaining the old firm name—effect upon estate of deceased partner.** Where a partnership is dissolved by the death of a partner, the retention of the firm name by the survivor will create no liability on the estate of the deceased partner, and the survivor, by accepting a draft in the firm name, will make himself individually liable therefor.

**2. CONTRACTS—by what law governed—as to their validity, etc.—and the remedy.** As a general rule, the *lex loci* will govern in determining the validity of contracts, and in their interpretation and construction. It does not follow, however, that all contracts, valid when made, will be enforced by the courts of other States or jurisdictions. In respect of the time, mode and extent of the remedy, the *lex fori* governs.

**3. INSOLVENT DEBTORS—foreign assignment—how far enforceable here—as between foreign and domestic creditors.** In the absence of domestic creditors, the assignee, under a valid foreign assignment of a debtor, may reduce to his possession the property and collect the debts assigned to him, situated in this State; and debtors here, owing the assignor and having no set-off, will be compelled to pay the assignee. But in case the foreign assignment, if made here, would be set aside as fraudulent, or as contrary to the policy of our laws, our courts will not enforce it as against attaching creditors, whether foreign or domestic, although it may be valid in the State where made.

**4. Although a voluntary foreign assignment, valid in the State where made, is enforced in this State as a matter of comity, yet our courts will not enforce it to the prejudice of our own citizens, who may have demands against the assignor. It is contrary to the policy of our laws to allow the property of a non-resident debtor to be withdrawn from this State, and thus compel creditors here to seek redress in a foreign jurisdiction; but for all other purposes, and between the citizens of the State where the assignment is made, if valid by the *lex loci*, it will be carried into effect by our courts.**

**APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.**

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Brief for the Appellants.

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Mr. J. M. H. BURGETT, for the appellants:

The answer of the garnishees, the plea of Harlan, and the admitted facts, show funds of Brooks in the garnishee's hands prior to the service of the writ. The burden was upon Harlan to show the facts discharging them from liability. Cushing's Trustee Process, p. 97, sec. 233; *Wright v. Ford*, 5 N. H. 178; *Giddings v. Coleman*, 12 id. 153; *North Star Co. v. Ladd*, 32 Minn. 381; *McCoy v. Williams*, 5 Gilm. 584; *Richards v. Stephenson*, 99 Mass. 311; *Grain v. Gould*, 46 Ill. 293; *Lane v. Felt*, 7 Gray, 491; *Maher v. Brown*, 2 La. 492; *Camp v. Hatter*, 11 Ala. 151; *Scott v. Stallsworth*, 12 id. 25; *Winslow v. Bracken*, 57 id. 368; *Parker v. Osborne*, 71 Me. 69.

The burden of proof was upon appellees to show that the fund had ceased to be liable to attachment for Brooks' debt; that the possession accompanied and followed the title; that the fund had been removed from the power, control and disposition of Brooks. *Young v. McClure*, 2 W. & S. (Pa.) 147; *Milne v. Henry*, 40 Pa. St. 352; *Hildreth v. Fitts*, 53 Vt. 684; *Rice v. Courtis*, 32 id. 450; *Thomas v. Calihan*, 5 Mart. (La.) 180; *Timson v. Ramsbottom*, 2 Keen, 35; *In re Tichener*, 35 Beav. 317; *Davenport v. Woodbridge*, 8 Greenl. 17.

According to the best authorities, the *situs* of a debt is, as to attaching creditors, the residence of the debtor, and the tribunal of that residence may exercise jurisdiction over it *in rem*, and the law of such residence determines when such debt shall be subject to attachment. *Roche v. Insurance Co.* 2 Bradw. 360; *Rhawn v. Pearce*, 110 Ill. 350; *Williams v. Ingersoll*, 89 N. Y. 508; *Dunlop v. Rogers*, 47 N. H. 281; *Milne v. Moreton*, 6 Binn. 353; *Varnum v. Camp*, 1 Green, (13 N. J.) 326; *Moore v. Bonnell*, 31 N. J. 90; *Johnson v. Parker*, 4 Bush, 149; *Martin v. Potter*, 34 Vt. 87; *Warner v. Jaffray*, 96 N. Y. 248; *Morgan v. Neville*, 74 Pa. St. 52; *Beer v. Hooper*, 32 Miss. 246; *Warren v. Copelin*, 4 Metc. 594; *Blanchard v. Russell*, 13 Mass. 1; *Hull v. Blake*, id. 153; *Bissell v. Briggs*, 9 id. 462; Story on Conflict of Laws, (8th ed.) secs. 592 a, 549, 550.

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Brief for the Appellees.

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For the purposes of this suit, appellants are to be regarded as if citizens of this State. There can be no preference of one over the other, under the Federal constitution. *Paul v. Virginia*, 8 Wall. 168; *Fosdick v. Schall*, 99 U. S. 235; *Green v. Van Buskirk*, 5 Wall. 307; 7 id. 139; *Bank v. Lacombe*, 84 N. Y. 267; *Warren v. Jaffray*, 96 id. 248; *Rhawn v. Pearce*, 110 Ill. 350; *Insurance Co. v. Bank*, 68 id. 348; *Mitchell v. Shook*, 72 id. 492; *Givens v. Bank*, 85 id. 442; *Ducat v. Chicago*, 48 id. 172; *Paine v. Lester*, 44 Conn. 196; *Morgan v. Neville*, 74 Pa. St. 52; *Martin v. Potter*, 34 Vt. 87; *Ward v. Morrison*, 25 id. 593; *De la Vega v. Vianna*, 1 B. & A. 284; Story on Conflict of Laws, (8th ed.) note, pp. 546, 547.

If appellants disregard their duties and obligations as citizens of Pennsylvania, it is for the courts of the latter State to apply the corrective, and not for our courts to administer the law of such State in this suit. *Embree v. Hanna*, 5 Johns. 101; *Bank v. Lacombe*, 84 N. Y. 367; *Insurance Co. v. Bank*, 68 Ill. 348.

Messrs. HUTCHINSON & LUFF, for the appellees:

The debt due from the garnishees to Brooks passed by the assignment, to Harlan, and was not liable to garnishment. The assignment, being valid by the laws of Pennsylvania, was sufficient to vest the debt in the assignee. *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Hoag v. Hunt*, 21 N. H. 106; *Smith v. Brown*, 43 id. 44; *Atwood v. Insurance Co.* 14 Conn. 555; *Van Buskirk v. Insurance Co.* id. 583; *Clark v. Peat Co.* 35 id. 303; *Speed v. May*, 17 Pa. St. 91; *Einer v. Best*, 32 Mo. 240; *Moore v. Bonnell*, 31 N. J. L. 90; *Whipple v. Thayer*, 16 Pick. 25; *Daniels v. Willard*, id. 36; *Burlock v. Taylor*, id. 335.

The *situs* of the debt was the domicile of the creditor or assignor. Wharton on Conflict of Laws, sec. 363; *Goodwin v. Holbrook*, 4 Wend. 379; *Atwood v. Insurance Co.* 14 Conn. 555.

Appellants having notice of the assignment, it was not necessary, in order to vest the debt in the assignee, to notify the

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Opinion of the Court.

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debtor. Notice *pendente lite* is sufficient. Story on Conflict of Laws, secs. 396-398; *Wood v. Partridge*, 11 Mass. 488; *Foster v. Sinkler*, 4 id. 450; *Dix v. Cobb*, id. 508; *Muir v. Schenk*, 3 Hill, 228; *Van Buskirk v. Insurance Co.* 14 Conn. 583; *Bishop v. Holcomb*, 10 id. 444.

The assignment is *prima facie* valid, and the burden was on appellants to show it was fraudulent. Bump on Fraudulent Conveyances, 365; *Whipple v. Pope*, 33 Ill. 334; *Townsend v. Stearns*, 32 N. Y. 209.

Insolvency of the assignor is not essential to the validity of an assignment.

A solvent debtor may make a valid assignment for the benefit of his creditors. Bump on Fraudulent Conveyances, 369; *Ogden v. Peters*, 21 N. Y. 23.

Per CURIAM: Josiah D. Brooks and D. Leeds Miller, while partners, doing business in Philadelphia under the name and style of Brooks, Miller & Co., acquired title to a lot in Cook county, in this State, in the firm name, and taken in payment of a firm debt. On November 23, 1883, the firm was dissolved by the death of Miller, but Brooks continued the business under the same firm name, and while so acting, on May 20, 1884, accepted a bill of exchange drawn on him in the said firm name, in favor of the plaintiffs, James S. Woodward & Sons. The retention and use of the firm name after Miller's death created no liability on Miller's estate, so that by accepting the draft in the firm name, Brooks made himself individually liable to the plaintiffs therefor. On July 1, 1884, Brooks entered into partnership with William G. Jenks, and they, under the same firm name, carried on business in Philadelphia until September 4, 1884, when they failed, and made a voluntary assignment for the benefit of creditors to Edward S. Harlan, assignee. The deed of assignment, after reciting that Brooks and Jenks were indebted to divers persons, grants, bargains, sells and conveys to said Harlan, "all and singular,

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Opinion of the Court.

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the lands, tenements and real estate, and also all the goods, chattels, effects and property of every kind, real, personal and mixed, of the said Josiah D. Brooks and William G. Jenks," except so much thereof as might be exempt from execution, in trust, to sell and dispose of the same, and to collect and receive all debts due to said Brooks and Jenks, or either of them, and from the proceeds to pay, first, the expenses incident to the trust; secondly, the "creditors of said Brooks and Jenks their respective just demands in full, if sufficient, otherwise, *pro rata*;" and lastly, any surplus "to said Brooks and Jenks."

The principal question discussed by counsel relates to the effect a voluntary assignment of all his property by a foreign debtor, for the benefit of creditors, will have on his property having a *situs* in this State. At the time of this assignment the garnishees had in their hands something over \$1200, one-half of which is claimed to belong to Josiah D. Brooks and the other half to the heirs of Miller, being the proceeds of the sale of the real estate before mentioned as belonging to the original firm of Brooks, Miller & Co. It is not shown that there had been an adjustment of the partnership assets and accounts between Brooks and the heirs of Miller, so that the extent of Brooks' interest in this sum of money can not be told. After the assignment was made, acknowledged and recorded in conformity with the laws of Pennsylvania, where the debtors resided, the plaintiffs, residents of the same State, with notice of the assignment, brought attachment in the Superior Court of Cook county against Brooks, and service was had on said garnishees. The assignee, Harlan, interpleaded in that cause, claiming one-half of the money in the garnishees' hands, under the assignment, while the plaintiffs claimed the same money in the hands of the garnishees by virtue of said attachment proceeding. The deed of assignment, apparently, is valid under the laws of the State of Pennsylvania. As the deed is there valid, it must be held valid here, it being the general rule that the *lex loci* will govern in determining the validity of con-

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Opinion of the Court.

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tracts, and in their interpretation and construction. It does not, however, follow, that all contracts valid where made, will be enforced by courts of other States or jurisdictions. In respect of the time, mode and extent of the remedy, the *lex fori* governs. *Mineral Point Railroad Co. v. Barron*, 83 Ill. 365.

In the absence of claims of domestic creditors, the assignee under a valid foreign assignment may reduce to his possession the property, and collect the debts assigned to him within this State, and debtors here, owing the assignor, and having no set-off, will be compelled to pay the assignee. But if the foreign assignment, if made here, would be set aside as fraudulent, or as contrary to the policy of our laws, our courts will not enforce it as against attaching creditors, whether foreign or domestic, although it may be valid in the State where made. *May v. Wannamacher*, 111 Mass. 202; *Zipcey v. Thompson*, 1 Gray, 243; *Fall River Iron Works Co. v. Croad*, 15 Pick. 11; *Kelley v. Craps*, 45 N. Y. 46; *Guillander v. Howell*, 35 id. 657.

As a voluntary foreign assignment, valid in the State where made, is enforced in this State as a matter of comity, our courts will not enforce it to the prejudice of our citizens who may have demands against the assignor. It is contrary to the policy of our laws to allow the property or funds of a non-resident debtor to be withdrawn from this State before his creditors residing here have been paid, and thus compel them to seek redress in a foreign jurisdiction; so it was held in *Heyer v. Alexander*, 108 Ill. 385, that a voluntary assignment of a non-resident debtor's property, valid under the laws of the State where made, will not be enforced here as against domestic attaching creditors. See *Chaffee v. Fourth National Bank*, 71 Me. 524; *Kelley v. Crap*, 45 N. Y. 46; *Johnston v. Parker*, 4 Bush, 149; *Chicago, Milwaukee and St. Paul Railway Co. v. Keokuk Northern Line Packet Co.* 108 Ill. 317; *Life Association of North America v. Fassett*, 102 id. 315.

In *May v. First National Bank of Attleboro*, 122 Ill. 551, we held that a voluntary assignment made in another State by a

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Opinion of the Court.

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non-resident there, executed in conformity with our laws in respect to the conveyance of property, but inconsistent, in substantial respects, with our statute relating to assignments, will not be enforced here to the detriment of our citizens; but for all other purposes, and between citizens of the State where the assignment was made, if valid by the *lex loci*, it will be carried into effect by the courts of this State. That case is decisive of the one at bar. In the present case there are no domestic creditors to be affected. The attaching creditors are resident in the same State with the assignor, and where the assignment was made and will be executed. As before seen, the assignment is valid under the laws of Pennsylvania, and capable of being enforced there, and under the doctrine announced, the courts of this State will give it effect as against citizens of Pennsylvania. The heirs of Miller are not complaining here. It seems that they, as well as the assignee, assignors and attaching creditors, are all residents of the same State. The claim made by the assignee, as well as by the attaching creditors, is of Brooks' interest in the money in the hands of the garnishees. If the Miller heirs have an equitable right to more than one-half of the money now in the hands of the garnishees, it is not perceived why that question may not be determined by an adjustment of the partnership accounts of the original firm in the courts of that State.

The rule here announced is not in conflict with *Rhawn v. Pearce*, 110 Ill. 350. In that case the assignment was not voluntary, but resulted by the laws of the State of Pennsylvania. A statutory assignment will not be enforced against attaching creditors of another State. *May v. First National Bank of Attleboro, supra.*

Finding no error in this record for which the judgment should be reversed, it is affirmed.

*Judgment affirmed.*

Mr. JUSTICE BAILEY, having heard this case in the Appellate Court, took no part in its decision here.

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Syllabus.

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## JOSEPH DONNERSBERGER

*v.*RICHARD PRENDERGAST *et al.**Filed at Springfield April 5, 1889.*

1. TOWNSHIP ORGANIZATION—*changing boundaries of towns, etc.—validity of amendatory act of 1887.* Section 12 of article 3 of the Township Organization law, as amended in June, 1887, so far as it relates to proceedings to disconnect part of the territory of one town and annex the same to a contiguous town, is a valid and constitutional law, but is void in so far as it attempts to change the boundaries of incorporated cities, towns and villages by limiting or extending their territorial boundaries and jurisdiction.

2. SAME—*effect of act of 1887, as a repeal of the prior law.* The provisions of section 12 of article 3 of the Township Organization law, as amended in 1887, being a valid law so far as it relates to the same subject matter included in the act of 1874, necessarily operates as a repeal of the former law, and the law as amended takes its place.

3. SAME—*former decisions.* The cases of *Dolese v. Pierce*, 124 Ill. 140, and *Village of Hyde Park v. City of Chicago*, id. 156, held, that section 12 of article 3 of the Township act of 1874, as amended in 1887, in so far as it attempted to authorize a change in the boundaries of incorporated cities and villages, was in violation of section 13 of article 4 of the Constitution, and therefore void. But the question of the validity of that law in providing for a change in the boundaries of towns by taking territory from one and annexing the same to another, was not involved.

4. CONSTITUTIONAL LAW—*title of an act—constitutional requirement.* The first clause of section 13 of article 4 of the constitution, which provides “that no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title,” only requires that the subject of the act be expressed, in general terms, in the title. It is sufficient if the title is comprehensive enough to reasonably include all falling within the general subject, and as subordinate branches thereof, the several objects which the statute assumes to effect.

5. SAME—*title of the act of 1887 amendatory of the Township Organization law of 1874.* The act of 1887, entitled “An act to amend sections 2, 4, 6, 7, 10, 11 and 12 of article 3 of an act entitled ‘An act to revise the law in relation to township organization,’ approved and in force March 4, 1874,” so far as it relates to the subject matter contained in the sections before amendment, and in respect of matters germane thereto, is a valid enactment, as the subject of it is expressed in its title; but in so

128	229
130	118
128	229
148	426
128	229
152	188
128	229
178	625
128	229
187	597

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Statement of the case.

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far as section 12 of the act of 1887 provides for a change in the boundaries of incorporated cities and villages, it is void, as not being embraced in the title of the act.

6. Under the title of the act of 1887, the legislature had the right to provide, as it did, for the change of township boundaries; but this right did not carry with it, as an incident, the power to change the boundaries of cities and villages, unless the change in the latter was necessary to effectuate a change in the former, or at least promote such object, which was not the case.

7. *SAME—part of an act void—validity of other portions.* Where the constitutional and unconstitutional provisions of a statute are distinct and separable, the valid provisions may stand and be enforced as though the invalid one had not been introduced. Because a portion of a statute is unconstitutional, it does not follow that the court may declare its other provisions void, if they are separable, and the valid portions are capable of enforcement independently of such void provision, unless it shall appear that all of the provisions of the act so depend on each other, operating together for the same purpose, or are otherwise so connected together in meaning, that it can not be presumed the legislature would have passed the one without the other.

8. Where an act is done under the provisions of a statute, some of which are void and others valid, it will be presumed to have been done without reference to the void provisions, unless there is something clearly indicating the contrary.

This was a petition for a *mandamus*, filed in this court by Joseph Donnersberger, against Richard Prendergast and others, composing the canvassing board of elections of the cities of Chicago and Lake View, the towns of Lake and Cicero, and villages of Hyde Park and Jefferson, to compel such board to canvass certain votes cast at the annual election held April 3, 1888, etc. The material facts appear in the opinion of the court.

Messrs. CRAFTS & STEVENS, for the relator.

Mr. S. S. GREGORY, and Mr. HEMPSTEAD WASHBURN, for the respondents.

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Opinion of the Court.

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Mr. JUSTICE SHOPE delivered the opinion of the Court:

This is a petition in this court by Joseph Donnersberger, against Richard Prendergast and others, who compose the board of canvassers of elections for the cities of Chicago and Lake View, the towns of Lake and Cicero, and the villages of Hyde Park and Jefferson, in Cook county, to compel such board to canvass the votes cast at the annual town election held April 3, 1888, in that part of sections 35 and 36, in township 39 north, range 13, east of the third principal meridian, which lies south-east of the Illinois and Michigan canal, in the county of Cook, which votes were cast for certain persons who were candidates for the various offices of supervisor, assessor, collector and town clerk in the town of South Chicago. The canvassing board refused to canvass or count said votes, claiming that such part of said sections 35 and 36 was a part of the town of Cicero, and not a part of the town of South Chicago. There is no question that originally, and prior to November 17, 1887, this territory composed a part of the town of Cicero. The petition herein sets forth the proceedings by which it is claimed that the territory in question was detached from the town of Cicero and annexed to the town of South Chicago. These proceedings are in all respects in conformity with section 12, of article 3, of the Township Organization law, as amended by act of the General Assembly approved June 15, 1887, in force July 1, 1887, so that if that section, as amended, is a valid law, under and by virtue of which portions of one town may be severed therefrom and annexed to another, this territory was legally taken from the town of Cicero and annexed to the town of South Chicago, and the prayer of petitioners should be granted. The case presented therefore raises the question whether section 12 of article 3, as amended in 1887, so far as it relates to proceedings where it is sought to disconnect part of the territory of one town and annex the same to a contiguous town, is void.

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Opinion of the Court.

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In the cases of *Dolese et al. v. Pierce*, 124 Ill. 140, and *Village of Hyde Park v. City of Chicago*, id. 156, it was held, that in so far as the act attempted to authorize a change in the boundaries of cities and incorporated villages, it was in violation of section 13, article 4, of the State constitution, and therefore void. It will be observed, by reference to the cases cited, that there was involved therein only the provisions of the act relating to the change of the boundaries of incorporated cities or villages, within which the territory proposed to be united was included; and in so far as the act under consideration attempts to deal with cities and villages by limiting or extending their territorial boundaries and jurisdiction, it was held unconstitutional and void.

Section 13, of article 4, of the constitution, provides: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

The act as amended, and under which the proceedings were had to disconnect the territory under consideration from one town and connect it with the other, is entitled, "An act to amend sections 2, 4, 6, 7, 10, 11 and 12, of article 3 of an act entitled 'An act to revise the law in relation to township organization,' approved and in force March 4, 1874." A reference to the act of 1874 will show that the sections of that law referred to, related exclusively to the division of towns, "re-adjusting the boundary lines of adjacent towns, by detaching territory from one and adding it to another, the uniting of two contiguous towns into one, and the manner of accomplishing these objects, including the adjustment of the property rights and liabilities of the towns affected." It follows, therefore, that so far as the act relates to the subject matter contained in the sections before amendment, and in respect of matters germane thereto, the subject of the act is expressed in

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Opinion of the Court.

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its title. The first clause in the provision of the constitution quoted, only requires the subject of the act to be expressed in general terms in the title. (*Johnson v. People*, 83 Ill. 431; *Jonesboro City v. Cairo, etc., Railroad Co.* 110 U. S. 192.) It is sufficient if the title is comprehensive enough to reasonably include, as falling within the general subject, and as subordinate branches thereof, the several objects which the statute assumes to affect. *Potwin v. Johnson*, 108 Ill. 70; *People v. Hazelwood*, 106 id. 319.

Section 12 as amended gives the county board full power to unite two or more contiguous towns into one, and "to disconnect territory from one of such towns and annex the same to another," and prescribing the manner in which such change shall be effected and the steps necessary to be pursued to accomplish that purpose, with other matters pertaining strictly to matters arising properly under the township organization system, and also provides, "that when said town to which such territory is annexed is wholly within the limits of an incorporated city, the limits of such city shall thereafter be extended to include the territory annexed to such town." It was the attempt to give effect to this latter clause or proviso that was involved in the cases of *Dolese v. Pierce* and *Hyde Park v. Chicago*, before referred to. As we have seen, those cases are decisive of the invalidity of that provision. In the first of the cases referred to, we said: "Under the title of the act of 1887, the legislature had the right to provide, as it did, for the change of township boundaries; but this right did not carry with it, as an incident, the power to change the boundaries of cities and villages, unless the change in the latter was necessary to effectuate a change in the former, or at least promote such object, and nothing of this kind is pretended." The question of the legality of the change of the boundaries of two towns, by taking territory from the one and annexing it to the other, was not involved in those cases. The provision relating to the extension of the limits of the city we then

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Opinion of the Court.

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thought, and are still of the opinion, was entirely foreign to anything relating to the system of township organization as established by law. It was held not to be germane to the subject expressed in the title of the act, and therefore in conflict with the first clause of the constitutional provision above quoted.

As we have seen, the constitution provides that where a subject is embraced in an act not expressed in its title, "the act shall be void only as to so much thereof as shall not be so expressed." Therefore, although a portion of the statute under consideration is unconstitutional, it does not follow that the court is authorized to declare its other provisions void, if they are separable from the void provisions and capable of enforcement independently of such void provisions, unless it shall appear that all of the provisions of the act are so dependent on each other, operating together for the same purpose, or are otherwise so connected together in meaning, that it can not be presumed that the legislature would have passed the one without the other provision. When the constitutional and unconstitutional provisions are distinct and separable, the valid provisions may stand as though the invalid provision had not been introduced. Cooley's Const. Lim. 177, 178, and notes. See, also, *Knox County v. Davis*, 63 Ill. 405; *Myers v. People*, 67 id. 503; *Binz v. Weber*, 81 id. 288; *Town of Middleport v. Aetna Life Ins. Co.* 82 id. 562; *Hinze v. People*, 92 id. 406; *Cornell v. People*, 107 id. 372; *People v. Hazelwood*, *supra*. The provision for changing the boundaries of towns under township organization in this section is distinct and separable from the annexation of one incorporated city or village to another, or extending the boundaries of an incorporated city or village so as to include the territory annexed within the city or village limit. We are of opinion, therefore, that the provision of section 12, article 3, of the act of 1887, so far as it relates to the uniting of towns, or detaching territory from one town and attaching it to another, being within the scope of the subject

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Opinion of the Court.

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expressed in the title of the act, was valid legislation, and may be carried into effect, notwithstanding the void provision relating to cities and villages, referred to.

In the case of *Hyde Park v. City of Chicago*, the facts and circumstances there shown raised the presumption that the vote was had with reference to the provision of the statute there held to be unconstitutional. It was there shown, that the petitioners in the petition presented to the county board, provided for in the 12th section of the act, describe themselves as residents of the "town or village of Hyde Park." They pray that the specified territory be disconnected "from the town or village of Hyde Park, and be annexed," etc. So the proceedings had by the board of commissioners designate the petition as being for disconnecting a portion of the "town or village of *Hyde Park*," and annexing it to the town of South Chicago, and so the clerk was directed to submit to the voters of the "town or village of *Hyde Park*" the question of annexation to South Chicago, of a part of the "town or village of *Hyde Park*." And it was there said: "When the voters are thus called on to vote for the annexation of a part of a town or part of a village, the question being submitted in an alternative form, and they vote for annexation and against annexation, how can the canvassing board say they voted to annex the town, rather than the village?"

It is apparent that the conclusion there reached in respect of the annexation of the town of Hyde Park to the town of South Chicago was based upon the peculiar circumstances of that case, with which conclusion we are entirely content. In this case no such question as was there presented arises. The question here submitted to the voters of the town interested was simply that of annexation of the portion of the town of Cicero indicated, to the town of South Chicago. It will not be presumed that the affirmative vote for the change in the boundaries of the two towns was given upon the assumption that it would have an effect different from that contemplated

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Opinion of the Court.

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by the question submitted. When an act is done under the provisions of a statute, some of which are void and others valid, it will be presumed to have been done without reference to the void or unconstitutional provisions, unless there is something clearly indicating to the contrary. The courts will not only uphold a statute so far as it is possible to be done without violence to the constitution, but will also uphold whatever has been done under or in pursuance of such statute, so far as the acts done appeared to be within the provisions of the valid portions of the statute. See *Penniman's case*, 103 U. S. 714; *Hills v. Exchange Bank*, 105 id. 319; *Unity v. Burrage*, 103 id. 447; *Florida Central Railroad Co. v. Schutte*, id. 118; *Edwards v. Pope*, 3 Scam. 465; *People ex rel. v. Cooper et al.* 83 Ill. 585; *Hinze v. People ex rel.* 92 id. 406.

We are of opinion that the act under consideration, providing for the disconnection of territory from one town and annexing it to another, is valid, and the proceedings in this case having been in conformity with its provisions, had the effect to disconnect all that part of sections 35 and 36 lying south-east of the Illinois and Michigan Canal, from the town of Cicero, and of annexing it to the town of South Chicago.

The views here expressed render it unnecessary for us to consider whether the proceedings can be upheld as being in conformity with the act of 1874. The provisions of section 12 being valid, so far as they relate to the same subject matter included in the act of 1874, necessarily operate as a repeal of the former act.

It therefore follows, that the annexation of the territory in question to the town of South Chicago was made in all respects in conformity with law, and must be upheld, and a peremptory writ of *mandamus* will issue.

*Mandamus granted.*

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Syllabus.

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THE GERMANIA INSURANCE COMPANY

128 237  
164 194

v.

CHARLES P. SWIGERT, Auditor.

*Filed at Springfield April 5, 1889.*

1. INSURANCE—*foreign companies—reciprocal burdens—when section 29 of the Insurance law of 1874 becomes operative.* The provisions of section 29 of the Insurance law of 1874, requiring insurance companies of other States having an agency in this State, to make the same deposits and to pay to the Auditor, the same taxes, fines, penalties and license fees as is or may be required by the laws of such other State of such companies organized under the laws of this State to be paid, apply and become operative from the time of the enactment of such laws by such other States requiring companies of this State to make deposits or pay fines, taxes, penalties or license fees, whether any company of this State shall have established agencies there, or not.

2. The time when our law requires a foreign insurance company doing business in this State to pay the same license fees, etc., required by the laws of the foreign State of companies of this State doing business therein, is whenever the existing or future law of such other State shall require companies of this State to pay license fees, etc., for the privilege of doing an insurance business therein.

3. SAME—*Insurance law of the State of Louisiana—in respect to foreign agencies.* In the statute of the State of Louisiana, which requires insurance companies organized under the laws of other States, and having agencies in that State, to pay an annual license of \$400, the words, "and having agencies in this State," are plainly but a part of the description of the subject matter upon which the law is to operate, and are not a statement of the time when the law is to exist or be in force.

4. SAME—*foreign agency of home company—report to Auditor.* There is no statute in this State requiring insurance companies organized under our laws to make a report to the Auditor whenever they establish agencies in foreign States, of that fact.

5. STATUTE—*law as a rule of conduct—to antecede the facts which may call it into action.* The existence of a law, and the existence of a present subject matter upon which it will take effect, are distinct things, the former depending upon the will of the legislature, and the latter upon the conduct of the people in the respect contemplated by the law after it is in force as a rule of action. The declaration of the rule of conduct must antecede the facts which call it into action.

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Statement of the case.

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6. APPEAL—*when State is interested.* In a suit by a foreign insurance company against the Auditor of Public Accounts, to recover back a license fee paid the latter under protest by the former, an appeal lies directly from the judgment of the trial court to this court, for the reason that the State is interested in the suit.

APPEAL from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

This is assumpsit, by appellant, against appellee, for the recovery of \$400, the amount of a license or tax collected by the latter of the former, under protest of the former. The following facts are agreed to:

"It is hereby stipulated, that for the purpose of settling the controversy now existing between the plaintiff and the defendant in the above entitled suit, in regard to the defendant's right or authority to levy, assess and enforce a reciprocal license tax or license fee against the plaintiff company, under section 29, chapter 73, of the Revised Statutes of the State of Illinois, the following statement of facts embraces the ultimate facts involved in said controversy, as the same can be established by competent proof, viz. :

"That the said Germania Insurance Company is a corporation organized under the laws of the State of Louisiana, and having its principal place of business at New Orleans, in said State; that on or about the 12th day of February, 1887, and for a long time prior thereto, the said plaintiff had fully complied with the Insurance law of the State of Illinois, except so far as relates to the license fee now in controversy, and was at said date doing business in said State in pursuance of said law, and that at said time Davis & Requa, of the city of Chicago, were the agents of said company; that on the day and year aforesaid, chapter 73 of the Revised Statutes of the State of Illinois was then in full force and effect, and among the provisions thereof were the following, viz., section 27, section 29, section 30; that in the year 1886 the General Assembly of the State of Louisiana amended and added to the insurance

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Statement of the case.

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law then existing in said State, further enactments and additions, among which was section 7 of article 101 of the law of 1886, which said section reads as follows, viz.:

"That each and every insurance company (society), association, corporation or other organization or firm or individual, doing and conducting an insurance business of any kind,—life, fire, marine, river, accident, or other,—in this State, whether such company (society), association, corporation or other organization or firm or individual is located or domiciled here, or operating here through a branch department, resident board, local office, firm, company, corporation or agency, of any kind whatsoever, shall pay a separate and distinct license on said business for each company represented, and said licenses shall be based on the gross annual amount of premiums on all risks located within this State, and upon risks located in other States or foreign countries, upon which no license has been paid therein, as follows, to-wit: '

"That after providing in a number of subdivisions for the license aforesaid, based upon the gross annual amount of premiums, as provided in said section 7, subdivision 12 reads as follows, viz. :

"When said premiums are \$20,000, and less than \$30,000, the license shall be \$400: *Provided*, that no corporation not incorporated under the laws of the State, nor any foreign society, firm or partnership, shall do business in this State except through an agent duly authorized and accredited for the purposes of said business, and for all purposes connected with licenses and taxation and service of process, said agent to be appointed by authentic act, and a certified copy of the act to be deposited in the office of the Secretary of State. Any person or firm who shall fill up or sign a policy or certificate of insurance on open marine or fire insurance policy, or otherwise issue, by a corporation or association or persons not located or represented in this State by a legally authorized agent, shall be considered an agent of such corporation or

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Statement of the case.

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person or association, and shall be liable for all licenses, taxes and penalties enforced by the provisions of this act upon such person, corporation and association, as if represented by a legally appointed agent: *Provided*, that nothing herein contained shall apply to mutual aid societies which pay mutual insurance policies by assessments upon members, whether the same be or be not domiciled in this State.'

"That on the day and year aforesaid, and at the time of the passage of the said law by the said General Assembly of the said State of Louisiana aforesaid, there was not, nor had there been for a long time prior thereto, or at any time since, any insurance company organized under the laws of the State of Illinois, or any Illinois insurance company, doing business in the said State of Louisiana, or any point therein; nor was there at such time, or at the time of the said passage of the said act, any Illinois insurance company having agencies in said State for the purpose of transacting an insurance business therein, or for any other purpose whatever; that the gross amount of premiums on risks taken by the agents of the said insurance company at said Chicago, and located in the said State of Illinois in which the said agents were authorized to, and did from time to time, issue policies during the year 1886, upon which no license had been paid therein, amounted to the sum of \$20,000, and was less than the sum of \$30,000; that, acting under said section 29, of chapter 73, of the Revised Statutes aforesaid, on the said 12th day of February, 1887, Charles P. Swigert, Auditor of Public Accounts of the said State of Illinois, levied, assessed and charged upon the said insurance company a license fee to the amount of four hundred dollars (\$400), an amount equivalent and equal to the sum so as aforesaid provided for in subdivision 12 of section 7 of the said act of the legislature of the State of Louisiana aforesaid, for the year 1887; that the said Auditor, further purporting to act in pursuance of said section 29, of chapter 73, of the Revised Statutes of said State of Illinois,

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Statement of the case.

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after the levy and charge so made by him in the manner and for the purpose aforesaid, notified said Davis & Requa, the agents of the said insurance company at Chicago, of said levy, assessment and charge, and thereupon requested payment thereof; that the said Davis & Requa, after communicating the fact of said levy to the officers of the said insurance company at New Orleans, in the said State of Louisiana, by direction of said company refused to pay the same, whereupon the said Auditor, acting in pursuance of the provisions of said chapter 73 of the Revised Statutes of said State of Illinois, threatened to withhold from or to refuse to issue to said company the license or certificate for the coming year provided for in and required by said act, and which had been previously issued to the said insurance company in former years, to enable said company to carry on the business of insurance in said State of Illinois in conformity with the requirements of the laws thereof, whereupon, and on the 23d day of July, 1887, the said insurance company, through its said agents, paid to the Auditor of said State, under protest, the said sum of \$400 so levied and assessed in the manner and for the purposes aforesaid; that the said sum so paid to the said Auditor as aforesaid, was paid to and received by him upon the express understanding that the same was paid under protest, and that it should be so received, held and treated by him until such time as the question of the validity of said levy and charge could be tested in the courts of the said State of Illinois; that the said Auditor of Public Accounts, under said section 27 of said chapter 73, was authorized to charge and collect as fees for filing the annual statement, the agent's certificate, and for advertising said statement for the year 1887, the sum of \$92, but no such fees were levied and charged under said section, nor was there any attempt to levy and make such charge or collect the same by the Auditor, nor were there any other fees levied and charged by the said Auditor of Public Accounts against the said plaintiff for the said year, save

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Statement of the case.

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and except the said sum of \$400 so levied and charged and collected in the manner and for the purpose aforesaid, under said section 29 of said chapter 73; that under the general revenue laws of the State of Louisiana, a foreign insurance company, like any other citizen or inhabitant of said State having and owning real and personal property therein, is taxed upon the fair market value of said real estate and personal property at the rate of six mills on the dollar, but there were no fees in said State, imposed by the insurance laws thereof, and in force therein at the time of the levy and charge of the said license fee of \$400, corresponding to those imposed by said section 27, nor is there any such tax imposed by the revenue laws of said State; that there is no statute in force in the State of Louisiana, nor was there any at the time of the levy and charge and payment of the said sum of \$400, corresponding to said section 29, of chapter 73, of the Revised Statutes of the said State of Illinois, nor was or is there in force in said State any statute whatever upon the subject of reciprocal tax; that the foregoing facts are to have the same weight and effect with the court, but no greater, than they would have if offered and admitted in evidence on the trial of said cause in the usual and regular way; and in stipulating the facts in the case, the defendant is not to be considered as waiving any rights he would have on the trial of said cause before a court and jury in the way provided by law, and on the trial thereof may except and preserve exceptions to any of the facts contained in said stipulation, in the same manner and to the same extent as might be done in the trial of said cause, and where the evidence was offered and received by the court on the trial thereof in the usual and ordinary manner; that either party to said suit may refer to any section or sections of the insurance laws of the said State of Louisiana not herein set forth, and to any section or parts of the revenue laws of said State which would be admissible in evidence upon trial in the usual way, and which may be deemed necessary and material to a

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Briefs of Counsel.

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full presentation of the questions of law involved in said suit, and to the same extent as though said laws had been incorporated in said stipulation, or set out in full in the declaration in said suit."

Judgment was rendered for the defendant, and the plaintiff brings the case here by appeal.

**Mr. D. J. SCHUYLER, for the appellant:**

The assessment and charge made on the plaintiff by the Auditor was invalid, and the plaintiff is entitled to judgment for the amount paid, as there was no Illinois company doing business in Louisiana. *Goldsmith v. Insurance Co.* 62 Ga. 379.

It is a familiar canon of statutory construction, that the legislature must have intended what they have actually expressed, unless some manifest incongruity would result from doing so, or unless the context clearly shows that such a construction would not be the right one. *Potter's Dwarris*, 206; *Jackson v. Lewis*, 17 Johns. 475; *People v. Railroad Co.* 13 N. Y. 77; *Martin v. Swift*, 120 Ill. 488.

If the expression, "and having agencies in such other States," is to be construed according to the ordinary and popular sense of the words, the Auditor could not collect the amount fixed by the Louisiana law. *Stuart v. Hamilton*, 66 Ill. 253.

That the judgment should be reversed, see Cooley on Taxation, 268, 269; *State Tonnage Tax cases*, 12 Wall. 204; *Gage v. Bailey*, 102 Ill. 11; *Bradford v. Chicago*, 25 id. 411; *Erskine v. Van Andale*, 15 Wall. 75; *La Salle County v. Simmons*, 5 Gilm. 513; *Pemberton v. Williams*, 87 Ill. 15.

**Mr. GEORGE HUNT, Attorney General, for the appellee:**

The statute makes it the duty of all insurance companies doing business in this State to file certain statements with the Auditor, to pay certain fees, and procure from the Auditor a license. Section 27, chapter 73, of the Revised Statutes, fixes certain fees to be paid by such companies, and section 29 re-

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Opinion of the Court.

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quires that foreign insurance companies shall pay the same license fees, etc., as the laws of their States require of companies of this State doing business in such other States. This latter section has been decided to be a valid law. *Insurance Co. v. Swigert*, 104 Ill. 653.

The language of section 29 does not make the collection of what is called the "reciprocal fee," depend, in any degree, upon whether or not a company from this State is in fact doing business in such other State, or in fact has agencies there. The condition upon which the increased fee becomes payable and section 29 becomes operative, is, "whenever the existing or future laws of any State" require a greater payment from companies of this State having agencies in such State than is required by the other laws of this State from companies of such State, then a like amount shall be required in this State. *Goldsmith v. Insurance Co.* 62 Ga. 383.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This appeal is prosecuted directly to this court, instead of to the Appellate Court, by virtue of section 2 of the act of June 3, 1879, amending section 88 of the Practice act, (Laws of 1879, p. 222,) because the State is interested in the result.

Section 29, of chapter 73, of the Revised Statutes of 1874, is as follows :

"Whenever the existing or future laws of any State of the United States, or any other kingdom or country, shall require of insurance companies incorporated by or organized under the laws of this State, and having agencies in such other State, kingdom or country, any deposit or securities in such State, kingdom or country, for the protection of policy holders or otherwise, of any payment for taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then, and in every such case, all companies of such States establishing,

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Opinion of the Court.

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or having heretofore established, an agency or agencies in the State, shall be and are hereby required to make the same deposit, for a like purpose, with the Auditor of this State, and to pay to the Auditor, for taxes, fines, penalties, certificates of authority, license fees and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof: *Provided*, that the payment required of such foreign companies shall in no case be less than required by this act."

The constitutionality of this section was sustained in *Home Ins. Co. v. Swigert*, 104 Ill. 666, and the only question upon it now presented for our determination is, whether it becomes operative at the time of the enactment of the law, with the designated requirement, by the foreign State, or not until a company acting under the laws of this State shall have agencies for the purpose of engaging in business in such foreign State. The court below held the former, and counsel for appellant contend for the latter. Appellant's counsel contends, that the words "and having" are qualified by the word "whenever," so that the sentence should read, "whenever the existing or future laws of any State \* \* \* shall require, \* \* \* and when such companies shall have agencies in such other State," etc. But this is, palpably, contrary to the natural meaning of the language as employed in the section. The *time when* is, plainly, "whenever the existing or future laws of any State \* \* \* shall require," etc. Does a law any the less require a thing to be done because there is no present subject matter upon which to operate? The requirement of the law is but the declaration of the rule to be observed, and it must antecede the facts which call it into action. The existence of the law, and the existence of a present subject matter upon which it will take effect, are entirely distinct things. The former depends upon the will of the legislature, while the latter depends upon the conduct of the people in the respect contem-

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Opinion of the Court.

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plated by the law, after the law is in force as a rule of action. Thus, the law prohibiting sales of spirituous liquors without a license, is none the less the law because nobody may want to sell liquors. It does not actively operate upon any particular person until some one wants to sell liquors; but whenever that occurs, it is actively operative upon *that* person, although it may be years after the law first went into force as a rule of action. So, here, the existing law in Louisiana requires of insurance companies organized under the laws of other States, (and therefore of this State,) and having agencies in that State, to pay an annual license of \$400, etc. The words, "and having agencies in this State," as they occur in that law, are plainly but a part of the description of the subject matter upon which the law is to operate, and are not a statement of the *time when the law is to exist or be in force*. The existing law makes the requirement,—declares the rule,—and it remains in force just as well without as with a present subject matter upon which to actively operate. And since it is the *existence of the law*, and not the *application of the law to its subject matter*, that determines when section 29 shall be obligatory, it must follow that it is unimportant whether insurance companies organized under the laws of this State have agencies in the State of Louisiana or not.

The manifest purpose of this enactment is to restrict insurance companies of other States in doing business in this State, by precisely the same restrictions with which insurance companies of this State are restricted in doing business in such other States, respectively, and so, necessarily, our law must read, with respect to insurance companies of Louisiana doing business in this State, in the exact language and meaning of the law of Louisiana with respect to insurance companies of other States doing business in that State. But the contention of counsel for appellant leads to the absurd (as it seems to us) result, that because the State of Louisiana has imposed upon all foreign insurance companies such severe restrictions as to

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Opinion of the Court.

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practically prohibit Illinois insurance companies from doing business in that State, no restriction is imposed by the laws of this State upon insurance companies of Louisiana doing business in this State, other than such as are imposed upon domestic companies, since it is evident that the sole reason why Illinois insurance companies have no agents for the transaction of business in the State of Louisiana, may be, and probably is, because of the severity of the restrictions imposed by the laws of that State upon insurance companies of other States doing business in that State. Plainly, it is intended that as the law of that State operates upon us, so the law of this State must operate upon them, and the same payment which our companies must make as a condition to doing business there, their companies must make as a condition to doing business here.

Moreover, it may be added, as a circumstance strongly corroborative that this was the legislative intent, that no provision is anywhere to be found, in any statute, whereby the Auditor can ascertain whether insurance companies organized under the laws of this State have agencies in the State of Louisiana, or in any other foreign State. The Auditor can not be expected to travel abroad in quest of such information, and he can employ no messenger to do so unless expressly authorized by statute, of the existence of which there is no pretense. No statute authorizes him to act upon reports, in this respect, made by officers of a foreign State, even if reports are there made, of which there is no evidence; and no statute requires insurance companies organized under the laws of this State to make report to the Auditor whenever they establish agencies in foreign States, of that fact. So, in a legal point of view, it is impossible for the Auditor to obtain evidence of the facts upon which, alone, as appellant's counsel contends, this section becomes operative, and hence, if appellant's contention be maintained, the legislature has simply enacted a section without providing legal means for its enforce-

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Syllabus.

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ment. Such a conclusion is never admissible, unless by no reasonable construction of the language employed is it possible to escape it. The language of the court in *Home Ins. Co. v. Swigert*, 104 Ill. 653, is to be read with reference to the questions then before the court. The question of whether insurance companies of this State must have agents doing business in the State of Louisiana, before the law of this State, *supra*, can operate upon insurance companies of Louisiana doing business in this State, was not before the court, and no rule in that respect was intended to be there announced.

Agreeing with the court below in its construction of the section, the judgment must be affirmed.

*Judgment affirmed.*

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WESTERN UNION TELEGRAPH COMPANY

v.

L. W. DUBOIS.

Filed at Springfield April 5, 1889.

128 348  
39a 559

128 348  
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1. **TELEGRAPHS—duty and liability—likened to common carriers.** Telegraph companies are the servants of the public, and are bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like common carriers, the law imposing on them a duty which they are bound to discharge. The extent of their liability is to transmit correctly the message as delivered.

2. **SAME—mistake in telegram—rights and remedy of the person receiving the dispatch.** In England the receiver of a telegraphic dispatch can not sue the telegraph company for a mistake therein, on the ground that the obligation of the company springs entirely from the contract, and that the contract for the transmission of the message is with the sender of it.

3. But in this country it is well settled that the receiver of the dispatch may maintain an action against the telegraph company through whose negligence the message has been altered or changed, for such loss or damage as he may have sustained by reason of having been led to act upon the dispatch.

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Brief for the Appellant.

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4. Where there is no contract relation between the receiver of a telegram and the telegraph company transmitting the same, the former can not maintain assumpsit against the latter for a loss caused by a neglect to send the message correctly. In such case, the receiver is limited to an action on the case, of which a justice of the peace has no jurisdiction.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Ford county; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. GROSS & BROADWELL, for the appellant:

Contracts may be created by an exchange of telegraphic messages, as well as by letter or other writing. 6 Wait's Actions and Defenses, 17, and cases cited.

The acceptance of an offer or proposition transmitted by telegraph creates a contract between the sender and receiver, the terms of which will be evidenced by the messages. *Duble v. Batts*, 38 Texas, 312; *Trevor v. Wood*, 36 N. Y. (9 Tiff.) 307; Scott & Jarnagan on Telegraphs, sec. 347; Bishop on Contracts, sec. 322.

A person selecting the telegraph as a means of communication makes the telegraph company his agent, and he is bound by the message as delivered to the person addressed. *Telegraph Co. v. Harris*, 19 Bradw. 347; *Morgan v. People*, 59 Ill. 58; *Durkee v. Railway Co.* 29 Vt. 127; *Ayer v. Telegraph Co.* 79 Me. 493; *Telegraph Co. v. Shotter*, 71 Ga. 760; *Dunning v. Roberts*, 35 Barb. 463; *Trevor v. Wood*, 36 N. Y. (9 Tiff.) 307; *Wilson v. Railroad Co.* 31 Minn. 481; *Saveland v. Green*, 40 Wis. 431; *Howland v. Whipple*, 48 N. H. 488; Scott & Jarnagan on Telegraphs, secs. 345, 347; Bishop on Contracts, sec. 328.

The relation existing between the sender of a telegraphic message and the company is contractual. The telegraph company undertakes and agrees to and with the person presenting a message, in consideration of its reasonable tolls paid or to

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Brief for the Appellee.

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be paid, to transmit by telegraph, and to deliver to the person addressed, the words of the offered message.

For a breach of contract the sender has his action against the telegraph company for all such damages by him sustained as are the direct, natural and necessary consequence of such breach, as contemplated by the parties, interpreting the contract in the light of the circumstances under which, and the knowledge of the parties for whom, the contract was made. *Baldwin v. Telegraph Co.* 45 N. Y. 744.

The relation between the telegraph company and a person to whom a message is addressed, is not contractual. They are not in privity. It is only when the person to whom the message is addressed is the one interested in its correct transmission, and by whom the expense of sending it is borne, that he will be regarded as the one with whom the contract is made. *De Rutte v. Telegraph Co.* 1 Daly, 547; 30 How. 403.

Messrs. TIPTON & MOFFETT, for the appellee:

The company offering no excuse for the mistake in transmitting the message, it is attributable to its negligence. *Pope v. Telegraph Co.* 9 Bradw. 283; 14 id. 535; *Telegraph Co. v. Harris*, 19 id. 347; *Telegraph Co. v. Valentine*, 18 id. 58.

Without regard to what the English rule may be, the American rule is, that there is sufficient privity of contract between the receiver of the message and the company to enable the former to maintain an action against the latter for negligence, although the price of transmission was paid by the sender. 6 Wait's Actions and Defences, 17; *Aiken v. Telegraph Co.* 5 S. C. 358; *Telegraph Co. v. Valentine*, 18 Bradw. 57; *Telegraph Co. v. Hope*, 11 id. 289; *Ellis v. Telegraph Co.* 13 Allen, 226; *May v. Telegraph Co.* 112 Mass. 90; *Ellwood v. Telegraph Co.* 45 N. Y. 549.

The delivery of the message by the company to the receiver amounts to a representation to him that it has been employed to transmit the intelligence it contains, which, if untrue,

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Brief for the Appellee.

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through the negligence of its servants, constitutes a misfeasance, for which the company is liable to the receiver. Bigelow on Fraud, chap. 1, sec. 3; *May v. Telegraph Co.* 112 Mass. 90; *True v. Telegraph Co.* 60 Me. 9; Wharton on Negligence, 757, 758, and authorities cited in note 5.

Shearman & Redfield on Negligence, sec. 560, pp. 611, 613, take the same view and assert the same principle that is announced by WALL, J., in *Telegraph Co. v. Hope*, 11 Bradw. 289.

There can be no question but that appellee is entitled to recover, and the circuit court so found, and the only remaining question that we care to discuss is the question of damages.

Whether appellee sustained any actual damages or not, appellee is still entitled to nominal damages. *Doud v. Guthrie*, 13 Bradw. 653; *Mellor v. Pilgrim*, 7 id. 306; *Logan v. Telegraph Co.* 84 Ill. 468; *Smitt v. Telegraph Co.* 7 Ky. L. 22; Cooley on Torts, 62, 63; 3 Sutherland on Damages, 298.

Appellee could not get the bill of lading without paying the draft. He could not maintain replevin by a tender and demand. His only remedy for a breach of the contract would have been a suit against Moore. *Low v. Freeman*, 12 Ill. 469; *Updike v. Henry*, 14 id. 378; *Haverstick v. Fergus*, 81 id. 105.

The alternative was presented of either paying the expenses of recovering back the \$200 paid to, and damages for breach of contract against, Moore, or paying the extra twenty cents per barrel and bringing this action. Appellee, under the circumstances, thought that lesser damages would result by his paying the twenty cents per barrel extra. It was his duty, when damages would necessarily follow by the negligent act of appellant, to take such action in the matter as would cause the least damage possible. Having done so, his measure of damages,—the actual damage sustained by him,—was twenty cents per barrel, or \$37.40; and this we say appellant is liable for in this action. *Telegraph Co. v. Valentine*, 18 Bradw. 57; *Strausse v. Telegraph Co.* 8 Biss. 104; *Telegraph Co. v. Fatman*, 73 Ga. 285; *Rule v. Telegraph Co.* 55 Texas, 308;

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Opinion of the Court.

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*Telegraph Co. v. Harris*, 19 Bradw. 347; 6 Wait's Actions and Defenses, 19, 20; 3 Sutherland on Damages, 298.

Appellee was compelled to, and did, pay twenty cents per barrel more than his contract was. He had acted on the telegram as received, and sold out the car of apples he had on hand on the basis that he was to replace them at \$1.55 per barrel. He was compelled to pay twenty cents per barrel more, by reason of the negligence of the appellant company.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

In the fall of 1887 appellee kept a restaurant and hotel in Gibson, Illinois. He had bought a car-load of apples, at some time during the fall, from I. H. Moore of North Java, New York, at \$1.50 per barrel. About October 1, 1887, he wrote a letter to Moore asking if another car-load could be furnished at the same price. On October 5, 1887, Moore answered the letter by sending a telegram. The telegram so sent, when received by appellee, read as follows: "Letter received. Can load car load of best winter fruit at \$1.55—answer." Appellee replied on the same day that he would accept the offer contained in the telegram, and sent Moore a draft for \$200.00 to apply on the purchase, Moore requiring such a deposit to insure the consummation of the bargain.

The telegram, as delivered by Moore to the appellant company for transmission to the appellee, read as follows: "Letter received—Can load car-load of best winter fruit at \$1.75—Answer." The error, by which the figures were made to read \$1.55 instead of \$1.75, was the fault of appellant. Appellee did not discover the mistake until after the \$200.00 had been paid and after Moore had shipped the apples. When the car arrived in Gibson it contained 187 barrels of apples, which were green fruit. Moore sent to the bank at Gibson a draft for the balance of the purchase at \$1.75 per barrel with the bill of lading attached. The bill of lading was to be delivered

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Opinion of the Court.

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to appellee upon payment of the draft, so that appellee could not get the bill of lading, or possession of the apples, without paying the draft. Thereupon he paid the draft, which, with the amount previously paid, was twenty cents per barrel more than the price, at which he had bought the apples, as stated in the telegram received and acted upon.

Appellee brought this suit before a justice of the peace for damages resulting to him from the mistake of the appellant in transmitting the message, and recovered \$37.40, being twenty cents per barrel on the 187 barrels. On appeal to the Circuit Court, where the trial was had before the court without a jury, judgment was entered in favor of appellee for one cent damages. Both parties excepted to the judgment of the Circuit Court and prayed an appeal to the Appellate Court, where errors were assigned on both sides. The Appellate Court reversed the judgment of the Circuit Court upon the cross-errors assigned by the appellee, and remanded the cause. Thereupon appellant made a motion to modify the judgment of reversal, so as to make said judgment final and with directions to the Circuit Court to render judgment against appellant for \$37.40 and costs, which motion was allowed and judgment entered accordingly. Upon petition by appellant, the Appellate Court granted a certificate that the case involves questions of law of such importance, on account of collateral interests, as that the same should be passed upon by the Supreme Court, and allowed an appeal to this court.

In England, the doctrine is that the receiver of a telegraphic dispatch can not sue the telegraph company, on the ground that the obligation of the company springs entirely from contract, and that the contract for the transmission of the message is with the sender of it. This doctrine, however, has never prevailed in the United States. Here, it is well settled that the receiver of the dispatch may maintain an action against the telegraph company, through whose negligence the message has been altered or changed, for such loss or damage

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Opinion of the Court.

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as he has sustained by reason of having been led to act upon the dispatch. Proof of the alteration or change is *prima facie* evidence of the negligence of the company. The burden rests upon the company to show that the error was caused by some agency, for which it is not liable. (*Western Union Telegraph Co. v. Tyler et al.* 74 Ill. 168). There is no doubt that appellee has a right of action against appellant under the facts above stated. The only question is as to the form of the action.

If the action must be in tort or case, this suit was improperly brought before a justice of the peace, because, under our statute, justices of the peace have no jurisdiction in actions on the case for such an injury as is here involved.

The original contract for the transmission of the message was made between Moore and the company. It does not appear, however, that there was any contract, express or implied, between appellee and the company, nor was there any contract relation of any kind between them. Under some of the authorities, where the sender of the dispatch is the agent of the party to whom it is sent, or where the contract between the sender and the company is for the benefit of the party to whom the message is sent, the latter may sue the company in assumpsit. But, here, the relation between Moore and the appellee was that of vendor and vendee. Moore wanted to sell his apples, and the proof shows that he paid for the telegram himself. He made the contract with the company for the transmission of the message in his own interest, and to effect a sale of his own property. We do not think, therefore, that appellee was entitled to bring against the company any action based upon the existence of a contract relation between him and the company. His remedy is in tort.

Telegraph companies are the servants of the public, and bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is to transmit correctly

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Opinion of the Court.

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the message as delivered. (*Tyler et al. v. Western Union Telegraph Co.* 60 Ill. 421). Hence, when the receiver of a dispatch suffers loss from the careless and negligent performance of its duty by such a company, he is entitled to recover damages for the tort, and the proper remedy is an action on the case.

The damages in such case should be for an amount which will compensate the plaintiff for his actual loss. They must be in satisfaction of the natural and proximate consequence of the defendant's act. In the present suit, appellee would not have bought the apples if he had known that their price was \$1.75 per barrel. The facts—that he did not discover the mistake until after the apples had been shipped, that he had already advanced \$200.00 towards their purchase, that he could not obtain possession of them without paying the balance of the purchase price at the rate of \$1.75 per barrel, that they were perishable property liable to be lost by the natural process of decay, if the delay in unloading them should be too great, and that appellee needed them in his business, having already disposed of a car load on hand in order to make room for the present consignment—authorized him to pay the extra twenty cents per barrel and look to the appellant for reimbursement. He was justified in relying upon his own judgment to make the loss as small as possible. Under the circumstances as thus detailed his judgment was a reasonable one.

We think the Appellate Court did right in fixing the amount of damages at \$37.40. But the distinctions between common law actions are still recognized in this State. The jurisdiction of justices of the peace is, in large measure, based upon and limited by such distinctions. It is our duty to recognize them. Inasmuch therefore as appellee has pursued the wrong remedy and before the wrong tribunal, the judgment must be reversed.

*Judgment reversed.*

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Syllabus.

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SAMUEL B. RAYMOND

v.

GEORGE M. VAUGHN.

*Filed at Ottawa May 16, 1889.*

1. **PARTNERSHIP**—*one of the partners becoming insane—effect upon the partnership relation—rights and duties arising therefrom.* The insanity of a partner does not, *per se*, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution. But this doctrine is applied, in equity, with appropriate limitations and restrictions, for while curable, temporary insanity will be sufficient, upon an inquisition, to sustain an adjudication of insanity in the county court, the appointment of a conservator, and commitment of the ward to an insane asylum, yet it will not authorize a court of chancery to decree a dissolution of a partnership if the malady be temporary, only, with a fair prospect of recovery within a reasonable time.

2. An adjudication of insanity by the county court can have no effect in determining the partnership, and upon bill to dissolve the partnership it will have no other effect than to establish the insanity. Courts of equity will, as between the partners, look to the effect produced upon the partnership relations and business, and refuse to dissolve the partnership and apply its assets unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation.

3. The relation of a partner embraces the character of both principal and agent. As to the partnership concerns, for himself he acts as principal, and as agent for his partners. His power to act for them is coupled with an interest in all that pertains to the firm business. Therefore, if, for any reason, one member of the firm should assume control and management of the business and affairs of the partnership, he should, while so controlling it, manage it for all, and in the interest of all the partners. He will not be allowed to derive personal advantage from the use of the partnership assets, or business or good will of the firm.

4. So where, after one of two partners had been adjudged insane, but his insanity was considered only temporary, and curable, and the other, without objection, or notice to any one, continued the business precisely as before, it was held, that the presumption was that he did not intend a dissolution of the firm, and, in the absence of evidence to the contrary, that he waited to determine whether the incapacity of his partner would prove temporary, merely, and it become practicable for him to resume business.

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Statement of the case.

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5. In such case, as long as the sane partner thus continued to carry on the business without taking steps to dissolve the partnership, there could be no dissolution, or he be excused from afterward accounting for the profits actually derived by him from the business of the firm.

6. *SAME—accounting of conservator to county court—whether conclusive.* A and B were partners in this State in the business of brokers, and the former was adjudged insane and the latter appointed his conservator, and continued the business precisely as before. The conservator did not inventory the partnership matters, and the profits of the business thereafter were not embraced in the final account of the conservator. Upon his recovery, A filed a bill in chancery for an accounting of the partnership matters and profits: *Held*, that the final accounting of the conservator partner in the county court was no bar to the relief sought by the bill.

7. The judgment of the county court approving a conservator's account and discharging him, without any notice, actual or constructive, to the ward, who was at the time in a lunatic asylum, is not conclusive upon the latter or his personal representative. A claim can not be barred by a proceeding in which it was in nowise involved, and of which the party to be estopped had no kind of notice.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. T. A. MORAN, Judge, presiding.

The following statement by the Appellate Court will be found sufficient to present the points determined:

"This was a bill brought in the court below, October 11, 1880, by the appellee, Vaughn, against the appellant, Raymond, as partner and trustee, for an accounting. There was a hearing upon pleadings, proofs and master's report, resulting in a decree in favor of the former, and against the latter, for the sum of \$9586.28, from which the latter appealed to this court.

"It appears that for several years prior to September 15, 1874, Vaughn had been representing, as broker in the wholesale sugar market of Chicago, the Franklin Sugar Refinery of Philadelphia, Pennsylvania, whose business was there conducted by Harrison, Havemeyer & Co., residents of that city,

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Statement of the case.

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and that Vaughn had not only enjoyed the confidence of that firm, but from his business as such broker had realized a very satisfactory income by way of commissions. It also appears that Raymond had for several years prior to said date been likewise engaged as broker in the wholesale sugar market of Chicago, he representing two or more sugar refineries in the East, from which he had realized large sums by way of commissions; that about September 15, 1874, the two, by agreement, entered into a sort of co-partnership, and began business together; that by that agreement they were to occupy the same office and conduct their respective agencies or business as such brokers in their individual names, as before; that no partnership name should be adopted; that no time for the continuance of their relations should be fixed, but that, from time to time, the total amounts of their commissions should be divided between them, Vaughn receiving one-third and Raymond two-thirds, and they were to share losses and expenses in the same proportion. A co-partnership relation is alleged in the bill, and expressly admitted by Raymond in his answer. It appears that the parties carried on their business together, under that arrangement, down to January, 1876; that during that period they had made several divisions of commissions received by them, respectively, but that they had no actual settlement of all their matters; that January 20, 1876, while their relations were subsisting as formerly, Vaughn was, upon proceedings duly commenced in the county court, adjudged to be temporarily insane, and committed to the hospital for the insane, at Elgin, Illinois. It further appears that in the order adjudging Vaughn to be insane, Raymond was appointed custodian of his person until he should be taken to the asylum; that on the same day of that order, Raymond filed and presented his petition to the county court for the purpose, and was appointed conservator of the estate of said Vaughn, with bond in the sum of \$13,000; that letters of conservatorship were duly issued to him March 13, 1876, at which date he

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Statement of the case.

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filed an inventory in said court, of the property of his ward. Vaughn was not discharged from the asylum until May, 1879, but it appears that on June 6, 1878, Raymond presented his final account to the county court, and was, upon consideration of it, discharged by the court from the duties of his trust as such conservator. It appears that in neither the said inventory nor final account did Raymond make any mention of said joint or partnership business. There was no evidence tending to show that Raymond, at any time between that of Vaughn becoming insane and his discharge from the asylum, signified, by any act or word, an election on his part to terminate the relations formed between them by the partnership agreement of September 15, 1874; but the evidence shows that from and after Vaughn had been declared insane, Raymond continued to carry on the business of said partnership, in all respects, as it had been carried on before, with the exception of Vaughn's personal attention to it, until the discharge of the latter from the asylum, and it was shown by a preponderance of the evidence, that Raymond recognized the continuance of Vaughn's interest in such business while he was so carrying it on, after the latter had become insane. It further appears that after Vaughn left the asylum, and some time in May, 1879, he met Raymond in Philadelphia, and that through the intercession of Harrison, Havemeyer & Co., an arrangement was made, by which Vaughn was to surrender, in favor of Raymond, the agency of the firm of Harrison, Havemeyer & Co., so far as related to Chicago, in the future, in consideration of which Raymond was to pay Vaughn \$2500, in monthly installments, and Harrison, Havemeyer & Co. agreed to give Vaughn a like agency in the city of Baltimore, in place of that in Chicago, which he had formerly had. In making that arrangement, no mention was made of any matter relating to the business carried on in Chicago during Vaughn's lunacy."

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Brief for the Plaintiff in Error.

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Messrs. FLOWER, REMY & GREGORY, for the plaintiff in error:

There was no partnership relation between the parties. There was no community of interest, except in the matter of the division of their separate earnings. The arrangement was a mere pooling of the earnings of the parties, and not the creation of a joint business. *Blue v. Leathers*, 15 Ill. 31; *Snell v. De Land*, 43 id. 323; *Adams v. Funk*, 53 id. 219.

Even though it should be conceded that the relation between the parties was a partnership one, it was dissolvable at will, as no time was agreed upon for its continuance.

The general rule is, that "any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases, and the partnership will then be deemed to continue only so far as may be necessary for the purpose of winding up its then pending affairs." 1 Lindley on Partnership, 220; *McElroy v. Lewis*, 76 N. Y. 373; *Carlton v. Cummings*, 51 Ind. 478; *Lawrence v. Robinson*, 4 Col. 567.

A dissolution of a partnership at will may be inferred from circumstances, although no notice to dissolve has been given; and the rule applies although one of the parties be a lunatic. *Wellerah v. Kean*, 27 Beav. 236; *Robertson v. Lockie*, 15 Sim. 285; *Southwick v. Allen*, 11 Vt. 75; *Grover v. Hall*, 3 H. & J. 43; *Bouche v. Pendergast*, 3 id. 33; *Emerson v. Parsons*, 2 Sweeney, 447; Parsons on Partnership, 418, 419.

So, also, a partnership at will, will be dissolved, *ipso facto*, by the withdrawal by a partner of that element which made him a partner. *Smith v. Vanderburg*, 46 Ill. 36.

The general English rule as to the effect of insanity upon partnership relations seems to be, that while it is good ground for dissolution, it does not, of itself, operate as one. Where there has been no adjudication, the practice seems to have been to ascertain that fact by a commission of lunacy. Where the insanity has already been judicially ascertained, the English courts hold, that upon bill filed for dissolution and accounting, the partnership must be held to be dissolved. *Kirby*

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Brief for the Defendant in Error.

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v. Carr, 3 Y. & C. 184; Waters v. Taylor, 2 Ves. & Bea. 299; Jones v. Noy, 2 M. & K. 125; Milne v. Bartlett, 3 Jno. 358.

The courts of this country have, however, extended the English rule on this subject, and hold that an inquisition of lunacy found against a member of a partnership, dissolves, *ipso facto*, the partnership. Parsons on Partnership, 484; Davis v. Lane, 10 N. H. 161; Isler v. Baker, 6 Humph. 85.

The general rule laid down by text writers on this subject, and amply supported by authority, is as follows: In matters of probate and administration, the inquiry, as in other cases, is, whether the matter was exclusively within the jurisdiction of the court, and whether a decree or judgment has been passed directly upon it. If the affirmative be true, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. 1 Greenleaf on Evidence, sec. 550; Smith v. Sims, 77 Mo. 269; Cecil v. Cecil, 19 Md. 79; Caujollie v. Ferrie, 13 Wall. 465; Chippen v. Dexter, 13 Gray, 330; 14 Pick. 280.

A final report and settlement of an estate by an executor, administrator or guardian, which are approved by the probate court, and the executor, administrator or guardian discharged, are final and conclusive in a collateral proceeding. Dickson v. Hitt, 98 Ill. 300; Abbott v. Broadstreet, 3 Allen, 587; Hood's Estate, 90 N. Y. 512.

If the transaction in Philadelphia was a settlement, it will be presumed to embrace all matters in difference between the parties, unless it appears, from the proof, that some part thereof was expressly excepted. Straubher v. Mohler, 80 Ill. 21; Niles v. Harmon, id. 393; Railway Co. v. Fawsett, 56 id. 513.

Mr. JOHN GIBBONS, for the defendant in error:

Insanity of a partner is only a ground for the dissolution of the partnership. It does not dissolve the firm *ipso facto*. Jones v. Noy, 2 M. & K. 125; Berch v. Frolich, 1 Phil. Ch. 172.

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Opinion of the Court.

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If Raymond carried on the business as before the insanity, using the assets of the firm and its good will, he can not appropriate the profits to his own use, but must account therefor. *Brown v. Richardson*, 133 Mass. 293; *Freeman v. Freeman*, 136 id. 260; *Cranshay v. Collins*, 15 Ves. 218; *Cook v. Collingridge*, 1 Jac. 608; *White v. Gardner*, 37 Tex. 407; *Drury v. Conner*, 1 H. & G. 220; *Chaney v. Smallwood*, 1 Gill, 367.

A judgment operates as an estoppel only as to matters in issue on points controverted therein. *Cromwell v. County of Sac*, 4 Otto, 351.

The *cestuis que trust* may still inquire into the administration of the trustee after his discharge. *Clark v. Devereaux*, 1 S. C. 172; *Wright's Trusts*, 3 K. & J. 419; 6 Ves. 455; 15 id. 218; 2 Abb. Pr. (N. S.) 375; 2 Ewell's *Lindley on Partnership*, 859.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was a bill filed by defendant in error, Vaughn, against Samuel B. Raymond, plaintiff in error, to compel an accounting in respect of partnership affairs alleged to exist between them. The answer of Raymond expressly admits the formation of the co-partnership as alleged in the bill, and its continuance from September 15, 1874, to the 20th day of January, 1876, when the complainant, Vaughn, was adjudged insane. It will therefore be unnecessary to discuss the question of the partnership, further than may become important in illustrating other branches of the case.

It is insisted by counsel for plaintiff in error, if the partnership existed, first, that it was *ipso facto* dissolved by the adjudication of the insanity of Vaughn by the county court of Cook county, on the 20th day of January, 1876, and that plaintiff in error, as conservator of Vaughn, accounted for all the property of Vaughn, and all his rights and credits accruing from the co-partnership prior to said date, in settlement of Vaughn's estate, in said court, and that, the partnership being dissolved, Vaughn has no claim, legal or equitable, to

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Opinion of the Court.

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the proceeds of the partnership business after such dissolution ; second, if this is not so, the partnership being determinable at the will of either party, Raymond elected to determine the partnership, and did terminate it at the date of the adjudication of insanity, and that such dissolution can be inferred from circumstances, and that the circumstances proved show such election by him ; third, that the discharge by the county court, of Raymond, as conservator of Vaughn, upon his final report as such conservator, is a bar to the relief sought by the bill in this case, so long as it remains unreversed ; and fourth, that in any event, by a settlement made between the parties, in Philadelphia, in June, 1879, Vaughn received of Raymond \$2500 in full satisfaction and discharge of his interest in the business and profits of such co-partnership.

The first contention presents questions of the most difficulty. It is said in Parsons on Contracts, 465 : "There are not wanting strong reasons and high authority for the conclusion that insanity, certain, complete and hopeless, of itself and at once dissolves the partnership ; but we think the decided weight of authority, in England and this country, opposes this conclusion, and holds that the partnership continues until it is dissolved by decree."

Chancellor KENT (3 Kent's Com. 58) says : "Insanity does not work a dissolution of partnership *ipso facto*. It depends upon circumstances, under the sound discretion of the court of chancery. But if lunacy be confirmed and duly ascertained, it may now be laid down as a general rule, notwithstanding the decision of Lord TALBOT to the contrary, that as partners are, respectively, to contribute skill and industry, as well as capital, to the business of the concern, the inability of a partner, by reason of lunacy, is a sound and just cause for the interference of the courts of chancery to dissolve the partnership, and have the account taken and the property duly applied." And the same author (2 Com. 645) says : "In cases

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Opinion of the Court.

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of partnership it would at least require a decree in chancery to dissolve the partnership on the ground of lunacy."

Story, in his work on Partnership, section 295, says: "The common law, \* \* \* upon grounds of public policy or convenience, holds that insanity does not ordinarily, *per se*, amount to a positive dissolution of the partnership, but only to a good and sufficient cause for a court of equity to decree a dissolution." This writer, however, adds: "We say 'ordinarily,' for when the insanity has been positively ascertained under a commission of lunacy, or by the regular judicial appointment of a guardian to the lunatic, it may deserve consideration, whether it does not *ipso facto* amount to a clear case of dissolution of the partnership by operation of law, since it immediately suspends the whole function and right of the party to act personally." Mr. Justice PARKER, in *Davis v. Lane*, 10 N. H. 161, makes the same suggestion. That case was, however, upon the effect of insanity in revoking the power of an agent to act for his principal. Mr. Parsons also seems to be of the opinion that the courts would hold that where the insanity was determined by due inquest, it would, *per se*, operate as a dissolution of the partnership. Both Story and Parsons refer in support of this latter suggestion to the case of *Isler v. Baker*, 6 Humph. 85, alone, to sustain the text. That case holds the doctrine indicated by Mr. Parsons, but stands, so far as we have been able to find, unsupported by any adjudicated case, and none are cited by the court in support of its conclusion. Collier on Partnership, (b. 2, chap. 3, sec. 3,) and Gow on Partnership, (chap. 5, sec. 1,) each lays down the rule that a decree of a court of chancery is necessary to a dissolution of the partnership, notwithstanding there has been an adjudication declaring one partner a lunatic.

In *Besch v. Frolich*, 1 Phil. Ch. 172, one of the partners had been adjudged insane upon commission of lunacy. Upon bill filed to dissolve the partnership, it was insisted that it should be decreed dissolved from the time of the incapacity of the

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Opinion of the Court.

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insane partner. This the court (Lord Chancellor COTTENHAM delivering the opinion) held could not be done, and says, "that there are three considerations between partners—the share of each in the capital stock, the share of each in the good will, and the labor which each undertakes to devote to the business. Your argument is, that because one of these considerations (and that, perhaps, the least valuable of the three,) fails, you are entitled from that time to take to yourself the whole benefit of the other two. \* \* \* Whatever delay has occurred is imputable to the plaintiff himself. It was competent for him to have filed his bill at any moment since the time when his partner first became incapable of attending to business."

In *Jones v. Noy*, 2 M. & K. 125, the partners were solicitors. One of them (Hardston) became insane and incapable of attending to business, and died two or three years afterwards. Noy, the other partner, carried on the business one or two years, and then sold it out. Hardston's executors filed a bill to compel Noy to account in respect to the partnership business and the proceeds of the sale. Sir JOHN LEACH, M. R., in determining the cause, said: "It is clear, upon principle, that the complete incapacity of the parties to the agreement to perform that which was a condition of the agreement, is a ground for determining the contract. The insanity of a partner is ground for the dissolution of a partnership, because it is immediate incapacity; but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he thinks fit, make it a ground of dissolution; but in that case I consider, with Lord KENYON, that in order to make it a ground for dissolution he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover

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Opinion of the Court.

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from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution." See, also, *Griswold v. Waddington*, 15 Johns. 57; *Bagshaw v. Parker*, 10 Beav. 532; *Sadler v. Lease*, 66 id. 624; *Robertson v. Lockie*, 15 Sim. 285; *Pierce v. Chamberlain*, 2 Ves. Sr. 33.

No further citation or analysis of authorities will be necessary. The rule, supported by the decided weight of authority and announcing the correct doctrine, is, that the insanity of a partner does not, *per se*, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution. But this doctrine must be understood, and is applied by courts of equity with appropriate limitations and restrictions, for while curable, temporary insanity will be sufficient, upon an inquisition, to sustain an adjudication of insanity in the county court, the appointment of a conservator and commitment of the ward to an insane asylum, yet it will not authorize a court of chancery to decree a dissolution of a partnership if the malady be temporary, only, with a fair prospect of recovery within a reasonable time. Story on Partnership, sec. 297.

Under our system, the adjudication of insanity may be had for the purpose of enabling those temporarily insane to avail of the facilities for treatment and cure provided by the beneficence of the State. In such case, the adjudication of the county court is necessary to their admission to the State Hospital for the Insane, where, in theory at least, the curable, only, are admitted. It is manifest that the adjudication by the county court can have no effect in determining the partnership, and upon bill filed to dissolve the partnership, it would have no other effect than to establish the insanity. Courts of equity will, as between the partners, look to the effect produced upon the partnership relations and business, and refuse to determine the partnership and apply its assets, unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation. A partner embraces

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Opinion of the Court.

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the character both of principal and agent. For himself, with respect to the concerns of the partnership, he virtually acts as principal, and as agent for his partners. His power to act for them is coupled with an interest in all that pertains to the business of the concern. It would seem, therefore, that if, for any reason, one member of the firm should assume control and management of the business and affairs of the partnership, he should, while so controlling it, manage it for all, and in the interest of all, the partners. His duty would not, perhaps, be strictly that of a trustee, but would be analogous to it, and he would not be allowed to derive personal advantage from the use of the partnership assets or business or good will of the firm. This rule is universal in its application to fiduciary relations. (*Brown v. Richardson*, 133 Mass. 293; *Freeman v. Freeman*, 136 id. 260; Perry on Trusts, secs. 127, 128, 455-464.) At any time after the insanity of Vaughn, the continuing partner had, if he saw proper to exercise it, the right to apply for a dissolution of the partnership, or, as it was a partnership at will, might have dissolved it of his own volition.

There is much evidence in the record tending to show that some time prior to January 20, 1876, Vaughn became deranged, but remained seemingly conscious of his own incapacity for business. Upon consultation with Raymond, they went together to an asylum near Chicago to consult a physician as to the best course to pursue, and it was agreed and determined that application be made to the county court to have Vaughn adjudged insane. Vaughn testifies, (and there is much in this record to corroborate his statement,) that it was agreed by Raymond, in view of his going to the asylum to be treated for his malady, that he (Raymond) would look after and attend to the business of the firm, and carry it on in his absence. It is not, however, necessary to put the case upon that ground, for it does clearly appear that Raymond, without objection or any notice to any one, continued the business precisely as before, and the presumption is that he did not intend a disso-

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Opinion of the Court.

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lution of the firm. It is to be presumed, in the absence of evidence showing to the contrary, that he waited to determine whether the incapacity of his partner would prove temporary, merely, and it become practicable for him to resume business. So long as he thus continued to carry on the partnership business without taking steps to dissolve the partnership, there could be no dissolution, or he be excused from afterwards accounting for the profits actually derived by him from the business of the firm. The circumstances relied upon as showing an election by Raymond to dissolve the co-partnership are wholly insufficient. On the contrary, it appears that these parties were brokers; that for a number of years prior to the formation of this partnership Vaughn had represented, as broker in the wholesale sugar market in Chicago, the Franklin Sugar Refinery of Philadelphia, Pennsylvania, whose business was there conducted by Harrison, Havemeyer & Co. It also appears that Raymond had been likewise engaged as a broker in sugars, in Chicago, he representing two or more sugar refineries in the East, each of the parties having realized considerable sums, by way of commissions, in the course of their business. By an arrangement between them, they consolidated their business, Vaughn receiving one-third and Raymond two-thirds of the profits, and they were to share losses and expenses in the same proportion. Each, however, remained the broker of the refineries that they had previously represented,—that is, Vaughn represented the Franklin Sugar Refinery, and no change was made in the agency whatever. After Vaughn was adjudged insane, instead of dissolving the co-partnership, or doing any act showing an intent so to do, Raymond continued to carry on the business, in all respects, as before. Vaughn still continued to be the broker of the Franklin Sugar Refinery, and that concern had no notice of any change in its brokers at Chicago. It is shown that a very large business was done by Raymond acting in the name of Vaughn, as broker of said refinery, and large profits were

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Opinion of the Court.

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received by him therefrom. Vaughn had brought the business of the Franklin Sugar Refinery to the firm. No confidence had been reposed by this principal in Raymond, he at no time having acted as individual broker of that refinery. It was not until after Vaughn's discharge from the asylum that Harrison, Havemeyer & Co. had any notice or intimation that Raymond pretended that a dissolution of the firm had taken place; and then, as it is clearly shown, to induce Harrison, Havemeyer & Co. to make him their broker at Chicago, and to induce Vaughn to give up and surrender the business in that city, Raymond paid Vaughn \$2500. Negotiations were had between these parties through Mr. Harrison, of the firm of Harrison, Havemeyer & Co., and his testimony leaves no doubt that the payment of said sum of \$2500 by Raymond to Vaughn, was for a surrender by Vaughn to Raymond of his (Vaughn's) right to act as broker for the Franklin Sugar Refinery in the Chicago market. We can not undertake to review this evidence in detail, but it leaves no question in our mind that the dissolution of the firm did not take place at any time prior to the settlement before spoken of, in respect to the future conduct of the business.

Upon the questions remaining to be considered, the Appellate Court, by McALLISTER, J., said:

"The next position taken in argument by appellant's counsel is, that the discharge of appellant by the county court, upon rendering his final account there as conservator, was a proceeding *in rem*, and, so long as it remains unreversed, is a complete bar to the relief sought by this bill, upon the principle of *res judicata*. That proceeding, so far as it relates to the adjudication as to the *status* of appellee, was, in our opinion, in the nature of a proceeding *in rem*. But the matters upon which the right to and claim for an accounting is based, were of a wholly different nature. This claim was not included in the inventory which appellant made as conservator, nor mentioned in his final accounting upon which he was discharged.

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Opinion of the Court.

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Passing upon it was in no respect necessary to the exercise of the jurisdiction of the court in the first instance, nor was it directly involved, or a necessary incident to any adjudication made. It was a matter of mere private individual right between these two parties, over which a court of chancery has jurisdiction, and over which, if the county court had any jurisdiction, it was in no sense exclusive. Besides, appellee was, at the time, confined in a lunatic asylum, and had no notice, actual or constructive. The distinction between those matters which are necessarily involved in a proceeding *in rem*, or in one in the nature of a proceeding *in rem*, as to which the decree is conclusive against all the world, and matters *inter partes*, or of mere private litigation, is recognized by the authorities, and has its foundation in the nature of things. 2 Smith's Lead. Cases, (7th Am. ed.) 632; 1 Greenleaf on Evidence, sec. 550. To hold a claim barred by a proceeding in which it was in no wise involved, and of which the party to be estopped had no kind of notice, would be to subvert and trample upon some of the most essential fundamental principles upon which the doctrine of the conclusiveness of judgments and decrees is based, because appellee never had his day in court as to this claim. We are of opinion that the transaction between the parties, in May, 1879, at Philadelphia, falls entirely short of a settlement of the claim so as to bar appellee's right to an accounting. This claim, and the matters out of which it arises, were none of them mentioned by either party."

We are entirely satisfied with what is there said, and adopt the views of that court.

We find no error in this record, and the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE BAILEY, having heard this case in the Appellate Court, took no part in its decision here.

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Syllabus.

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JOHN DAYTON

v.

DRAINAGE COMMISSIONERS.

*Filed at Springfield April 5, 1889.*

1. WATER-COURSES—*surface waters—dominant and servient heritage rights at the common law.* The owner of a dominant estate has no right, at common law, to divert the waters of a slough therein into a channel wholly different from that in which they naturally flow.

2. The owner of a higher tract of land has the right to have the surface water falling or naturally coming upon his premises by rains or melting snow, pass off through the natural drains upon or over the lower or servient land next adjoining; and the owner of the dominant heritage has the right, by ditches and drains, to drain his own land into the channels which nature has provided, even if the quantity of water in that way thrown upon the next and adjoining lower lands is thereby increased.

3. But the owner of the higher lands has no right to open or remove natural barriers, and let on to such lower land water which would not otherwise naturally flow in that direction. That would be to subject the servient heritage to an unreasonable burden, which the law will not permit.

4. SAME—under *Drainage law of 1885—rights of dominant heritage.* Under section 42 of the Drainage act of 1885, the owner of lands outside of a drainage district may connect with ditches of the district already made, and thus drain his own lands; but by so doing he will virtually annex his lands to the district, and subject them to at least the same burdens which they would have borne if they had been originally included in the district. But he can not, under that section, divert into the district the drainage of large tracts belonging to other proprietors, who have taken no action in the matter, and whose lands are not brought into the district and made to assume any of its burdens.

5. INJUNCTIONS—to prevent wrongful diversion of surface waters. An injunction is the proper remedy to prevent the wrongful diversion of surface water upon the lands of another. In such case, the damages thereby occasioned are continuing or often recurring, and difficult of computation, and therefore an injunction is the only adequate remedy.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Douglas county; the Hon. C. B. SMITH, Judge, presiding.

128	271
38a	261
128	271
144	326
128	271
152	133
45a	109
128	271
61a	596
128	271
77a	516
128	271
191	4627

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Briefs of Counsel.

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Mr. ANTHONY THORNTON, Mr. C. W. WOOLVERTON, and Mr. W. J. AMMEN, for the appellant:

If any wrong has been done, the complainants had full and adequate remedy at law. 3 Starr & Curtis' Stat. p. 210, sec. 10; 1 High on Injunction, sec. 28; *Thornton v. Roll*, 118 Ill. 363; *Coughron v. Swift*, 18 id. 414.

Appellant had the right, under the statute, to connect his ditch with that constructed by the commissioners. Sess. Laws 1879, p. 151, sec. 35; 1 Starr & Curtis, p. 151, sec. 133; 3 id. p. 219, sec. 42.

The evidence largely preponderates, that the acts charged would not injure the drainage district. If no drainage district had been organized, appellant had the right to drain his land, as he has attempted. *Peck v. Herrington*, 109 Ill. 612.

The alleged injury is too uncertain to justify the interposition by injunction. The remedy sought is premature. See 1 High on Injunctions, secs. 734, 742, 743; *Dunning v. City of Aurora*, 40 Ill. 486; *Lake View v. Letz*, 44 id. 84; *Bridge Co. v. Railroad Co.* 6 Paige, 563; *Kennerty v. Phosphate Co.* 17 S. C. 411.

Messrs. ECKHART & MOORE, for the appellees:

Appellees have authority to sue as drainage commissioners. Hurd's Stat. 1885, chap. 42, sec. 1.

A drainage district is a municipal corporation. *Commissioners v. Kelsey*, 120 Ill. 482.

After the completion of the work, the commissioners shall thereafter keep the same in repair. Hurd's Stat. 1885, chap. 42, sec. 41, p. 494.

The courts will restrain the placing of obstructions in or upon public highways, streets, bridges, grounds and navigable waters. *Railway Co. v. Chicago*, 96 Ill. 627; *Watertown v. Cowen*, 4 Paige, 510; *Jacksonville v. Railway Co.* 67 Ill. 540; *Attorney General v. Cohoes*, 6 Paige, 135.

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Brief for the Appellees.

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The remedy by injunction to prevent improper diversion of surface water, is clearly established. *Hicks v. Silliman*, 93 Ill. 255.

Surface water can not be changed by artificial means, and if by such means the flow is changed, an injunction will be given. *Railroad Co. v. Morrison*, 71 Ill. 616; *Railroad Co. v. Cox*, 91 id. 500; *Nevins v. Peoria*, 41 id. 502; *Mellor v. Pilgrim*, 3 Bradw. 476; *Johnson v. Rea*, 12 id. 335.

While the owner of lower lands shall receive all water that naturally flows from the next higher lands, the owner of the higher lands may not open or remove natural barriers, and let on such lower lands water that would not otherwise naturally flow in that direction. *Anderson v. Henderson*, 124 Ill. 164.

An upper proprietor is liable in damages at law, or may, in case of irreparable injury, be restrained by injunction, if he so diverts the stream as to cause the water to be discharged upon the land or into the ditches or mines of a neighbor. Gould on Waters, p. 381.

It follows from this, that where the injury may be reasonably expected to result, unless prevented, the plaintiff need not wait for damage to accrue before filing his bill. Gould on Waters, p. 701.

The allegations were, that the defendants intended, as a part of a system of water works, to increase the volume of a stream flowing through the plaintiff's lands; that the plaintiff was credibly informed, and believed, that such increase would cause the stream to overflow its banks and render his land valueless,—and these were accompanied by a statement of the facts upon which the bill was founded. It was held, that the allegations made out a sufficient case for equitable interference. Gould on Waters, p. 701.

The diversion or obstruction of a water-course has been the subject of frequent equitable interference by injunction. *High on Injunctions*, (2d ed.) sec. 795; Gould on Waters, 715, 733; *Laney v. Jasper*, 39 Ill. 46.

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Opinion of the Court.

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The injury complained of is such, that from its continuance the mischief is permanent, constantly recurring, and can not otherwise be prevented than by injunction. 2 Story's Eq. Jur. secs. 925-927; 2 Hilliard on Torts, 94, note a; Angell on Water-courses, p. 20, sec. 4; *Lyon v. McLaughlin*, 32 Vt. 423.

The statutory right of individual land owners to make connection with ditches of a district has no application in this case.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a bill in chancery, brought by the Drainage Commissioners of Drainage District number 2, in the town of Newman, Douglas county, against John Dayton, to restrain the defendant from digging a certain ditch on his land and connecting it with one of the ditches in said drainage district. Said district was organized under the Drainage Act of 1879, embracing a territory of 4300 acres of land, and has constructed a main ditch and various lateral ditches, one of the latter being known as branch ditch number 3. The defendant is the owner of some 400 acres of land, of which an eighty acre tract, viz., the west half of the south-west quarter of section 17, township 16, north, of range 14, west of the second principal meridian, is included in and lies on the easterly border of the district, and is crossed in a northerly and southerly direction by said branch ditch number 3. The residue of the defendant's land not included in the district also lies in said section 17, and adjoins the tract above described on the east. The lands lying east of the district constitute, as is alleged, another water-shed drained by a water-course known as Bolinger's Slough, which takes its rise in section 4, about two miles north-east of the site of the defendant's proposed ditch, and runs thence in a south-westerly direction to and across the east half of the south-west quarter of section 17, which is a part of the defendant's land, and thence for several

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Opinion of the Court.

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miles in a southerly direction to Bushy Fork Creek. Certain ditches and tile-drains have been constructed so as to drain portions of the land north into the slough, and so that the slough, as is alleged, drains about 1600 acres of land before it enters the lands of the defendant.

The bill alleges that the defendant, without authority of law, threatens and intends to construct and is constructing a ditch on the east half of the south-west quarter of said section 17 so as to connect said slough with said branch ditch number 3, and intends thereby to give an outlet to the waters from said large body of lands adjoining said district into said branch ditch; that neither said branch ditch nor the main ditch of the district is of sufficient capacity to carry off the increased flow of water from said lands, and that the diversion of said waters from their natural course into said branch ditch will cause irreparable injury to the lands in said district lying along said branch and main ditch.

The defendant answered denying each of the several allegations of the bill, and the cause being heard on pleadings and proofs, a decree was entered finding the allegations of the bill to be true, and perpetually enjoining the defendant from digging or making the ditch connecting said slough with said branch ditch and thereby giving said slough an outlet into said branch ditch, but ordering that the defendant should not be restrained from draining his own land into said drainage district. This decree was affirmed by the Appellate Court on appeal, and by a further appeal the record is brought to this court.

Whether said slough is such a channel or water-course as is alleged in the bill is a question of fact upon which the evidence is conflicting. The testimony on behalf of the complainants tends to show that the natural drainage from a large territory lying north of the defendant's lands is into said slough, and that drains and ditches have already been constructed by which a large portion of that territory is being

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Opinion of the Court.

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drained through that channel, and that the construction by the defendant of his proposed ditch would divert the drainage of all that area from its natural course into the ditches belonging to said district, and also that the capacity of said ditches is insufficient to carry off such additional flow of water. The defendant, on the other hand, gave evidence tending to show that the natural drainage from the lands in question is towards the south-west and over the lands included in the drainage district; that the ditches in said district are amply sufficient to carry off all the water which would be brought to them by means of the ditch the defendant proposes to construct, and that such additional flow of water, instead of being a detriment, would be a positive benefit to the complainants' drainage system. The finding of the Circuit Court upon these contested questions of fact is in favor of the complainants, and upon consideration of all the evidence we are unable to say that such finding is not fully warranted.

Assuming the facts to be correctly decided, the decree restraining the defendant from diverting the waters of Bolinger slough into the ditches of the drainage district would seem to follow as a necessary result. The defendant has no right at common law, as the owner of the dominant estate, to divert the waters of the slough into a channel wholly different from that in which they would naturally run. The rule undoubtedly is, that the owner of a higher tract of land has the right to have the surface water falling or naturally coming upon his premises by rains or melting snow pass off through the natural drains upon or over the lower or servient lands next adjoining, and the owner of the dominant heritage has the right, by ditches and drains, to drain his own land into the channels which nature has provided, even if the quantity of water in that way thrown upon the next adjoining lower lands is thereby increased. But the owner of the higher lands has no right to open or remove natural barriers and let on to such lower lands water which would not otherwise naturally flow in

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Opinion of the Court.

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that direction. That would be to subject the servient heritage to an unreasonable burden which the law will not permit, and against which the owner ought reasonably to have protection. *Anderson v. Henderson*, 124 Ill. 164.

But the defendant claims the right to construct said ditch by virtue of section 42 of the Drainage Act of 1885. That section provides that the owners of land outside of a drainage district may connect with the ditches of the district already made, by the payment of such amount as they would have been assessed if originally included in the district; or if such connection, by increase of water, requires an enlargement of the district ditches, then the outside owners of the land so connecting are required to pay the cost of such enlargement. And it is further provided that, if individual land owners outside of the district shall so connect, they shall be deemed to have voluntarily applied to be included in the district, and their lands benefited by drainage shall be treated, classified and taxed like other lands within the district. Laws of 1885, page 91.

Doubtless, under these provisions, the defendant has the right to connect ditches draining his own lands with the district ditches, but by so doing he will virtually annex his lands to the district, and subject them to at least the same burdens which they would have borne if they had been originally included in the district. This right however was fully recognized and protected by the decree, the injunction being so modified as to permit the defendant to drain his own lands into the drainage district.

But the ditch the defendant is endeavoring to construct involves much more than the drainage of his own lands. Its effect will be to divert into the district ditches the drainage of large tracts of land belonging to other proprietors. But it will not bring those lands within the jurisdiction of the district or subject them to any of its burdens. That the defendant has no power to do, and as the owners of these lands are tak-

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Opinion of the Court.

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ing no steps in the premises, they are not brought within the provisions of section 42 of the Drainage Act and can not thereby be included in the district. The construction of the defendant's proposed ditch therefore would give to large tracts of outlying lands all the benefits of the drainage system provided by the district without subjecting them to any of its burdens. It is very clear that such results are not within the contemplation of said section 42. Under that section the defendant has a right to drain his own lands into the district ditches, but he has no right to construct a ditch which will only serve as a channel through which to convey to said ditches the drainage of lands not included in the district and belonging to other proprietors.

It is insisted with much earnestness that the complainants had an adequate and complete remedy at law, and that a court of chancery therefore should not have assumed jurisdiction. That an injunction is the proper remedy to prevent the wrongful diversion of surface water is clearly established. *Hicks v. Siliman*, 93 Ill. 255; Gould on Waters, 715. The evidence clearly shows that the proposed diversion of surface water was wrongful, and that the damages which would be occasioned thereby would be continuing or often recurring and difficult of computation, and an injunction therefore was the only adequate remedy.

We find no error in the decree, and the judgment of the Appellate Court will therefore be affirmed.

*Judgment affirmed.*

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Syllabus.

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## THE CHELTENHAM IMPROVEMENT COMPANY

v.

WILLIAM H. WHITEHEAD.

Filed at Ottawa May 16, 1889.

1. MORTGAGES—*foreclosure—allegations and proofs—as to removal of tax title by mortgagee.* A bill to foreclose a deed of trust alleged that the mortgagor, for himself, etc., covenanted that he and they would pay all taxes, etc., levied or assessed against the lands mortgaged until the mortgage debt was paid, but that owing to the neglect and default of the mortgagor or his assigns, a large amount of taxes and assessments are now due and owing on the premises and are a lien thereon, and that taxes and assessments have been allowed to go to judgment and sale, and deeds have been issued on said real estate, or a part thereof still remaining as security. To the bill was attached a copy of the trust deed, which provided that all payments by the holder of the notes should be added to the mortgage indebtedness: Held, that the allegations in the bill, taken with the trust deed, were sufficient upon which to predicate evidence of the complainant's payment of \$1000 with which to purchase an outstanding tax title.

2. SAME—*solicitor's fees—in whose favor allowable—clause in deed of trust construed.* A deed of trust given to secure notes, provided that on default of payment, etc., the trustee might, in his own name or otherwise, file a bill to foreclose, and further authorized such trustee to take from the proceeds of the sale under the foreclosure, five per cent thereof for solicitor's fees. A bill was filed to foreclose, by the holder of the notes, and the court allowed the same solicitor's fees as if the bill had been filed in the name of the trustee, for the reason that it mattered not to the mortgagor to which of the parties he paid the solicitor's fee.

3. SAME—*allowance for abstract of title.* The party foreclosing a deed of trust will not be entitled to have allowed, in addition to the debt, interest, costs and attorney's fees, for an abstract of title and expenses incurred in procuring data to foreclose, in the absence of any clause in the trust deed which, by reasonable construction, gives the right. A clause authorizing the trustee to pay "also all other expenses of this trust," will not authorize the court to charge the trust estate for such abstract, etc.

4. CHANCERY—*exceptions to the master's report—whether necessary.* Where a cause is referred to the master in chancery to take the evidence and report his conclusions of fact, if the evidence before the master is incompetent, or insufficient to establish a claim or fact against the de-

128	279
37a	627
128	279
41a	443
128	279
51a	301
128	279
53a	627
54a	566
55a	348
128	279
59a	431
59a	680
60a	247
60a	289
61a	257
128	279
147	295
128	279
70a	674
128	279
172	639
128	279
77a	113
128	279
178	541
128	279
180	398
128	279
85a	383
85a	384
85a	514
128	279
185	210
128	279
190	4175
94a	4888
128	279
96a	1124
128	279
194	4282
196	4561
100a	4250
100a	4252
100a	4254
128	279
102a	4346
128	279
108a	4224
128	279
203	4403
204	4640
f107a	4685
128	279
212	4225
f218	4100

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Statement of the case.

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fendant, he must file exceptions to the master's report, and if overruled, renew the same in the trial court, otherwise he can not afterward call in question the sufficiency of the evidence. The master's report, where no exceptions are taken, is conclusive on the parties.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

This was a bill in equity, brought by defendant in error, William H. Whitehead, to foreclose a deed of trust. The facts are fully stated in the opinion of the Appellate Court, as follows:

"On the 29th day of November, 1880, Ira N. Herrick executed two promissory notes, for \$17,040 each, payable to the order of Franklin H. Watriss, in one and two years after date, with interest, and to secure their payment executed a deed of trust to George W. Smith, as trustee, conveying six separate parcels of land. The first note was paid at maturity, and two of said parcels of land were thereupon released from said deed of trust. Partial payments were made on the other note, and the present bill was brought to foreclose the deed of trust for the residue remaining unpaid.

"The deed of trust contained, among other things, a covenant that the grantor would, in due season, pay all taxes on said lands, and in case of his refusal or neglect so to do, the grantee, or his successors in trust, or the holder of said notes, or either of them, might pay such taxes, and that the moneys thus paid, with interest thereon at the rate of eight per cent per annum, should become so much additional indebtedness secured by said deed of trust, to be paid out of the proceeds of the sale of said lands, if not otherwise paid by the grantor. Said deed of trust also contained the following provision:

"'In case of default in the payment of said promissory notes, or either of them, or any part thereof, according to the tenor and effect of said notes, \* \* \* or in case of waste or non-payment of taxes, \* \* \* or in case of the breach of any of the covenants or agreements herein mentioned, then

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Statement of the case.

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and from thenceforth it shall be lawful for said party of the second part, or his successor in trust, or the person who may be appointed by the court to execute this trust, on application of the legal holder of said promissory notes, or either of them, to enter into and upon and take possession of the premises hereby granted, or any part thereof, and to collect and receive all rents, issues and profits thereof, and in his own name, or otherwise, to file a bill or bills in any court having jurisdiction thereof, against the said party of the first part, his heirs, executors and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises, for the purposes herein specified, by said party of the second part, as such trustee, or as special commissioner, or otherwise, under order of said court, and out of the proceeds of any such sale to first pay the costs of said suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and five per cent on the amount of such principal, interest and costs, for attorneys' and solicitors' fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at eight per cent per annum, then to pay the principal of said notes, whether due and payable by the terms thereof, or at the option of the legal holder thereof, and interest due on said notes up to the time of said sale, rendering the overplus, if any, unto the party of the first part, his legal representatives or assigns, on reasonable request.'

"Prior to filing the bill, William H. Whitehead, the complainant, became the owner of the unpaid note, by purchase, and Herrick conveyed all of said parcels of land to A. B. Meeker, who in turn conveyed three of the four tracts not released from the deed of trust, to the Cheltenham Improvement Company. The bill makes the Cheltenham Improvement Company, George W. Smith, the trustee, Herrick, the maker

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Brief for the Plaintiff in Error.

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of the notes, and various other parties who had or claimed some interest in the premises, parties defendant. The default of the Cheltenham Improvement Company was duly entered, and on reference to the master it was found that the balance (principal and interest) due on said note was \$13,182; that the complainant had been compelled to pay out the sum of \$1000 to redeem a portion of said premises from a tax sale; that he had paid out for an abstract of title, and for the procurement of certain information or data necessary to be used in preparing and filing the bill, the sum of \$260. To this the master added five per cent of the amount found due, being \$719, for solicitors' fees, thus making a total of \$15,161. The master's report was approved, and a decree entered fixing the amount due on the deed of trust at the last mentioned sum, and awarding a sale of said premises therefor."

The Cheltenham Improvement Company appealed to the Appellate Court, where it was held that the decree was erroneous in allowing the attorney's fee and the item of \$260 for abstract. The cause was reversed, with directions to the circuit court to enter a decree for the amount found due complainant by the decree, less the two items mentioned above. To reverse the judgment of the Appellate Court the Cheltenham Improvement Company sued out this writ of error, and the complainant in the bill, William H. Whitehead, has assigned cross-errors, calling in question the decision of the Appellate Court in regard to the two items above mentioned.

**Mr. FREDERIC ULLMAN, for the plaintiff in error:**

The circuit court erred in allowing \$260 for an abstract of title, and for "obtaining the information provided for in the said trust deed and in the preparation of this cause." There is no authority in the deed of trust for such allowance.

It was error to allow \$1000 paid out for an alleged tax title, and to provide that the same should be a lien on the land of the plaintiff in error. The bill fails to show that appellee had

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Brief for the Defendant in Error. Opinion of the Court.

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paid out any money for taxes, and he had not done so, in fact, as the evidence shows. *Adams v. Payson*, 11 Ill. 26; *Augustine v. Doud*, 1 Bradw. 593.

It was error to allow appellee \$719 as solicitor's fees. The deed of trust provides for the payment of the solicitor's fee only in case of a foreclosure by the trustee. Such a provision is to be construed strictly.

Messrs. WHITEHEAD & PICKARD, for the defendant in error:

In stating a claim of the complainant in chancery, it is only necessary to do so generally. A general charge or statement of a matter of fact is sufficient. Story's Eq. Pl. sec. 28.

Having had the right to file exceptions to the master's report, but having failed to do so, either before the master or in the court below, the plaintiff in error is precluded from making such objections in this court, and the master's report must be taken, in this court, as "conclusive of the questions covered by it." *Pennell v. Insurance Co.* 73 Ill. 303; *McClay v. Norris*, 4 Gilm. 370; *Clark v. Laughlin*, 62 Ill. 278; *Brockman v. Aulger*, 12 id. 277; *Jewell v. Paper Co.* 101 id. 57; *Hurd v. Goodrich*, 59 id. 450; *M. E. Church v. Jacques*, 3 Johns. Ch. 77; *Prince v. Cutler*, 69 Ill. 267.

It is contended that the provision for an attorney's fee covers the case only of a bill filed by the trustee. The deed says, "in his own name or otherwise." The word "otherwise," will cover a sale by the master.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

No fault whatever is found with the amount due on the note secured by the trust deed, as determined in the decree, but it is insisted that the allowance of \$1000 for money paid in the purchase of an outstanding tax title is erroneous, upon two grounds: First, because it was not claimed in the bill; and second, it is not a proper allowance under the evidence.

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Opinion of the Court.

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Upon an examination of the bill, the following allegation in regard to tax claims will be found:

"And further, your orator says, that in and by said trust deed the said Ira N. Herrick, for himself and his heirs, executors, administrators and assigns, covenanted that he and they would pay all taxes and assessments levied or assessed against the real estate in the said trust deed described, until the indebtedness secured thereby should be fully paid; but your orator shows, that owing to the neglect and default of the said Ira N. Herrick, or his assigns, a large amount of taxes and assessments is now due and owing on the said premises, and are a lien thereon, and that taxes and assessments have been allowed to go to judgment, sale, and deeds have been issued on said real estate, or a part thereof still remaining as security under said trust, and for the indebtedness due your orator, as aforesaid."

In addition to this allegation, the trust deed was attached to and made a part of the bill. If the bill had contained an allegation of the amount of the tax lien, and that the same had been paid by the complainant, it would not be subject to criticism; but the allegation, in connection with the terms of the trust deed, which is a part of the bill, is, in our judgment, sufficient upon which to predicate the evidence of the payment of the \$1000 item embraced in the decree.

As to the sufficiency of the evidence to support this item in the decree, plaintiff in error is in no position to raise the question. The cause was referred to the master in chancery to take the proofs and report to the court. The evidence was taken and a report filed, but no exception was taken to the report of the master in regard to tax liens and payment of tax liens, either before the master or in the circuit court. If, in the opinion of the plaintiff in error, the evidence offered before the master was incompetent or insufficient to establish the claim, he was required to file exceptions before the master, and, if overruled there, renew the exceptions in the circuit

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Opinion of the Court.

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court. Had this course been pursued, the objection now relied upon might properly be considered; but as no exception was taken before the master, or in the circuit court, plaintiff in error is precluded from making the objection here. The master's report must be held conclusive of all questions covered by it not excepted to. *Pennell v. Lamar Ins. Co.* 73 Ill. 303.

As has been seen, the court, in the decree, allowed complainant \$260 for an abstract of title and expenses incurred in procuring data to foreclose the trust deed. We find no clause in the trust deed which can, upon any reasonable construction, be held to authorize a claim of this character, and, in the absence of authority in the trust deed, the court had no power to allow the amount. It is true that the trust deed contains a clause which authorizes the trustee, upon sale of the mortgaged premises, in distributing the proceeds, to pay certain specified claims, and "also all other expenses of this trust." Whatever expenses the trustee might necessarily incur in making a sale of the property under the power or decree, such as advertising, or perhaps procuring an auctioneer, would be a legitimate charge on the fund derived from the sale; but we do not think the obtaining of an abstract was any part of the expenses of the trust. An abstract might be useful to the attorneys who were employed to foreclose the mortgage, to furnish the names of persons who might have liens on the mortgaged premises; but at the same time, the mortgagor ought not to be charged with and compelled to pay for such information, unless it clearly appeared, from the mortgage, that he had agreed to do so, which is not the case here.

One other question remains to be considered, and that is, whether the solicitor's fee of \$719 was an element proper to be embraced in the decree. As heretofore stated, the trust deed provides, in case of default in the payment of the debt, or in case of the breach of any of the covenants of the deed, the party of the second part (the trustee named in the deed) is authorized, in his own name or otherwise, to file a bill to fore-

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Opinion of the Court.

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close the mortgaged premises and to obtain a decree of sale, and from the proceeds of the sale the deed provides that five per cent of the amount of the debt shall be paid as solicitors' fees. It is not denied, if the bill had been filed in the name of the trustee, that the amount provided in the decree for solicitors' fees would be a proper charge, under the terms of the deed of trust; but as the bill was filed in the name of the holder of the mortgage indebtedness, and not in the name of the trustee, it is claimed that the allowance was not authorized. We do not assent to this construction of the language used in the trust deed. The object in providing for attorneys' fees in the trust deed was, in the event that the mortgagor should fail to pay the debt, and the holder of the indebtedness should be compelled to foreclose the trust deed in order to collect the debt, then solicitors' fees should be allowed. What difference could it make with the mortgagor whether the bill should be filed in the name of the trustee or in the name of the holder of the indebtedness? We do not see that the liability of the mortgagor could in any manner be changed, whether the bill was brought in the one name or the other. Moreover, the language of the deed of trust, giving it a fair construction, will not admit of the meaning attempted to be placed upon it. The solicitors' fees are payable upon the filing of a bill in the name of the trustee, or *otherwise*. Some meaning must be given to the word "*otherwise*." It can not be arbitrarily rejected. And we are of opinion that a fair and reasonable construction of the contract will fully authorize the allowance of solicitors' fees, whether the bill was filed in the name of the trustee or some other person.

The judgment of the Appellate Court will be reversed as respects the solicitor's fee named in the decree. In all other respects it will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE BAILEY, having heard this case in the Appellate Court, took no part in its decision here.

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Syllabus.

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JOSEPH BAYLIES

v.

JOSEPHINE M. CURRY.

*Filed at Ottawa May 16, 1889.*

1. COLORED PERSONS—*civil rights—access to theaters, etc.—discrimination on account of race or color.* All persons in this State are entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of theaters, etc., subject only to the conditions and limitations established by law, and applicable to all citizens, and an action will lie against any one who shall deny another such rights and privileges on account of his race or color.
2. So if the proprietor of a theater shall deny a colored person access to his theater, or to the several circles or grades of seats therein, on account of his race or color, he will be liable to such person so aggrieved in an action for damages.
3. In an action by a colored woman, against the proprietor of a theater, for denying her equal privileges, etc., the only case her evidence tended to prove was, that after having paid, through another, for a ticket to the first balcony, she was first denied admission thereto, and afterward denied admission to any part of the theater, on account of her color. On the trial, the defendant offered to prove that he had adopted a rule requiring colored people to sit in the same row, separate from white people, and that it was the rule of his theater that colored persons were given the same advantages, for the same price, in all parts thereof, that whites had, except that the former were assigned a particular row of seats,—which the court refused to allow: *Held*, that the court ruled properly, as the proposed evidence was irrelevant to the issue.
4. SAME—*constitutionality of the act.* It can not reasonably be contended that the provisions of “An act to protect all citizens in their civil and legal rights, and fixing a penalty for violation of the same,” approved June 10, 1885, in so far as they give an action against the proprietor of a theater for denying a colored person access thereto, are void, as being repugnant to the constitution of this State or of the United States.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. A. N. WATERMAN, Judge, presiding.

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Statement of the case. Brief for the Appellant.

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This was an action brought in the circuit court of Cook county, by Josephine M. Curry, a woman of color, against Joseph Baylies, proprietor of the People's Theater of Chicago, for denying her the full and equal enjoyment of the accommodations, advantages, facilities and privileges of the theater whereof he was proprietor, under the act entitled "An act to protect all citizens in their civil and legal rights, and fixing a penalty for violation of the same," approved June 10, 1885. (Laws of 1885, p. 64.) The defendant pleaded not guilty. The jury found the defendant guilty, and assessed the plaintiff's damages at \$100. The circuit court overruled a motion for a new trial, and gave judgment upon the verdict of the jury, and this judgment, on appeal to the Appellate Court for the First District, was affirmed. The case is now brought to this court by appeal from that judgment.

Messrs. McCURDY & JOB, for the appellant:

Under the common law, common carriers could not separate negroes and white persons from mere caprice or race prejudice ; but if the intention was to prevent conflicts, and to preserve order and decorum, a rule by which colored persons were required to occupy seats separate from white persons, equally desirable and comfortable, has been held to be reasonable and lawful. *Railroad Co. v. Williams*, 55 Ill. 186; *Railroad Co. v. Miles*, 55 Pa. 211; "*The Sue*," 22 Fed. Rep. 843; *Logwood v. Memphis*, 23 id. 319; *Hall v. De Cuir*, 95 U. S. 487.

As to the construction and constitutionality of the act in question, see Desty on Federal Procedure, (6th ed.) 781; *Hall v. De Cuir*, 96 U. S. 499; *De Cuir v. Benson*, 27 La. Ann. 5; *Sauvinet v. Walker*, id. 14.

The rule of the theater does not discriminate against colored people, but operates upon both whites and blacks. *Chase v. Stephenson*, 71 Ill. 383; *People v. Board of Education*, 101 id. 310; *People v. Gallagher*, 93 N. Y. 341; *State v. Duffy*, 7 Nev. 345; *Ex rel. Hobbs & Johnson*, 1 Wood's C. C. 537.

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Brief for the Appellee.

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Appellant filed in the court below a motion in arrest of judgment, which the court overruled. We insist this was error. The record discloses a declaration in case, of four counts, each of which is framed upon the statute in question, concluding against the form of the statute. This statute is penal. *St. Louis v. Hill*, 11 Bradw. 248.

Debt will lie on a penal statute where the form of action is not therein specified. *Vaughan v. Thompson*, 15 Ill. 39; *Kerr v. Davis*, 38 Tenn. 73; *Blackburn v. Baker*, 7 Port. (Ala.) 290.

In the case of the party grieved, where a statute prohibits the doing of anything, under a penalty, to be paid to the party aggrieved, and does not prescribe the mode of recovery, it shall be recovered in an action of debt. *Espinasse on Penal Actions*, 57.

Case will not lie on such a statute. *Mount v. Hunter*, 58 Ill. 247.

Mr. EDWARD H. MORRIS, for the appellee:

Appellee's cause of action arose from the act of appellant in absolutely refusing to sell her any seat in his theater because of her color, and not, as contended by appellant, in denying her a particular one; and because of this, so far as this case goes, the question so ably discussed by counsel, as to the right of appellant to provide colored people with seats equally as good as the ones given to white persons, does not arise.

The statute is a just and proper exercise of the police powers vested in the State, and in no way violates the property rights protected by the constitution. *Joseph v. Bidwell*, 28 La. Ann. 382; Cooley's Const. Lim. 734.

Providing accommodations equally as good, is not a compliance with a statute which provides that there shall be no discrimination or exclusion on account of color. It is merely "an ingenious attempt to evade a compliance with the obvious meaning of the requirements" of the law. *Railroad Co. v. Brown*, 17 Wall. 445.

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Opinion of the Court.

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Such was the construction placed upon an act of Louisiana, which provided that proprietors of street cars, stage coaches, etc., should make no discrimination on account of race or color. *De Cuir v. Benson*, 27 La. Ann. 1; *Sauvinet v. Walker*, id. 14; *Hart v. Hoss*, 22 id. 517.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The case made by appellee's evidence, as stated in the printed argument presented to us by appellant's counsel, is: "On Sunday evening, June 6, 1886, appellee (who is a colored woman) applied to the box-office of appellant's theater for tickets, and was refused them; that she then procured a white customer of her husband to get tickets for her; that with these tickets she and her husband entered the theater and ascended to the balcony, where they were refused seats by the usher because the seat coupons had been torn from their tickets, which was done by the door-keeper; that the usher referred her to the door-keeper, the door-keeper to the box-office, and that at the box-office her money was returned and she and her husband went away." To this must be added, appellee testified that the gentleman in the ticket office, who, she says, "looked like Mr. Baylies, threw the money at me, swore, and said he didn't want no damned niggers in there; told me to take my crowd and get out." This, it is true, is contradicted by evidence on behalf of appellant; but since there is no evidence tending to show that appellee was otherwise deprived of the "full and equal enjoyment of the accommodations, advantages, facilities and privileges" of the theater than as thus detailed by her, the jury must have found that the evidence preponderated in behalf of her statement, and the judgment of the Appellate Court, affirming the judgment of the circuit court, requires us to accept that view of the facts.

Appellant, upon the trial, offered to prove that he had, in order to avoid collision between the races, adopted a rule, (and

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Opinion of the Court.

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that such rule was necessary,) to the effect that the colored people should have one row to themselves in each part of the house, or as many rows as the tickets which they bought would call for; but the court refused to allow the evidence to be given. He also offered to prove that it was the rule of his theater that colored persons were given the same advantages for the same price, in all parts of this theater, that white persons had, with the exception, only, that the colored persons were assigned to a particular row of seats; but the court refused to allow the evidence to be given. Appellant also asked the court to give to the jury, among others, the following instructions, but the court declined to do so, namely:

“3. The jury are instructed that the defendants were legally justified in assigning colored persons to seats in the theater of defendant, Baylies, separate and apart from the seats of white persons, provided the seats to which such colored persons were assigned were equally comfortable and well situated.

“5. You are instructed, as a matter of law, that the proprietor or manager of a theater has the right to make such reasonable rules as he may see fit, regarding the seating of the occupants of his theater, or the disposition, arrangement or classification of tickets sold to different persons or classes of persons, provided such rules are reasonable, and do not discriminate against any certain class or race of people as regards the prices and location of such seats.”

Exceptions to these rulings present the only question that we are now required to consider.

It would seem too plain to admit of serious controversy, that the circuit court ruled properly, because the evidence offered and the instructions asked were irrelevant to the issue being tried by the jury. Appellee offered no evidence tending to show that appellant or his servants seated or offered to seat her in the same row with other colored people, against her objection, nor did appellant introduce or offer to introduce

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Opinion of the Court.

such evidence. The only case her evidence tended to prove was, that after having paid, through another, for the requisite ticket to the "first balcony," she was first denied admission thereto, and afterwards denied admission to every part of the theater, because of her color. The rule requiring colored people to sit in the same row, separate and apart from white people, manifestly had no tendency to justify either of these exclusions.

Beyond all question, sections 1 and 2 of the "Act to protect all citizens in their civil and legal rights, and fixing a penalty for violation of the same," approved June 10, 1885, (Laws of 1885, p. 64,) prohibit the denial of access to the theater and to the several circles or grades of seats therein because of race or color, for such is, in effect, the language employed. The first section says: "All persons within the jurisdiction of said State shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of \* \* \* theaters, \* \* \* subject only to the conditions and limitations established by law, and applicable alike to all citizens." The second section says: "Any person who shall violate any of the provisions of the foregoing section, by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, \* \* \* shall for every such offense forfeit and pay a sum not less than twenty-five (25) dollars, nor more than five hundred (500) dollars, to the person aggrieved thereby."

It would be difficult to employ more comprehensive and sweeping language to abolish all distinctions in accommodations, facilities, privileges or advantages in theaters on account of race or color, than that thus employed. But it is enough for the present that it includes denial of access to the theater, and denial to the first balcony of the theater, and that it is not contended, nor, in our opinion, can it reasonably be con-

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Syllabus.

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tended, that these sections are inoperative by reason of repugnance to provisions of the constitution of this State or of the United States.

The judgment is affirmed.

*Judgment affirmed.*

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EMILY H. PRATT *et al.*

v.

JOHN A. J. KENDIG *et al.*

*Filed at Ottawa May 16, 1889.*

128	293
148	381
128	298
189	544
128	293
199	382
128	298
210	468
111a	7625

1. CHANCERY—*bill to quiet title—jurisdiction.* Where one has already sufficiently established his right, at law, to land, and yet is in danger of being harassed by fresh attempts to interfere with such right, a court of equity will grant a perpetual injunction to quiet his possession and protect him against the annoyance of future suits. Although it must appear that the right has already been satisfactorily established at law before equity will interfere, it is not material what number of trials have taken place,—whether two, only, or more.

2. But it can make no difference whether the proceeding in which the right has been established is an action at law or a suit in chancery, if the latter is one of such a character as to authorize a court of equity to adjudicate upon the legal title.

3. The jurisdiction of courts of equity of bills of peace, depends upon other considerations than the question of possession. It depends upon the fact that the complainant has several times satisfactorily established his title.

4. The owner of a tract of land laid out into lots, in three prior suits established his title as against the defendant, and was in the possession of the same, by himself and tenants. As the tenant on a certain lot was leaving the same, the defendant, by fraud and deception, obtained the keys of the building, and wrongfully entered the same. The owner, through his agent, entered without legal process, and re-possessed himself, and filed his bill to quiet his possession, and to enjoin the prosecution of suits of trespass and forcible entry brought by the defendant, and to set aside a deed made by the defendant, as a cloud on the title: *Held*, that the jurisdiction of the court to entertain the bill, so far as the lot was concerned, did not depend on the manner in which complainant re-possessed himself, but upon broader grounds. If the

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Brief for the Appellants.

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suit had been merely to remove a cloud, and had embraced the one lot only, the nature and character of complainant's possession might have been important, as affecting his right to maintain the bill.

5. *SAME--of the decree--on bill to quiet title.* On bill to quiet title to real estate, and to perpetually enjoin the defendant from bringing or prosecuting further suits, and to set aside a deed made by the defendant as a cloud on the title to a part of the land, it is proper for the court, by its decree, to quiet the complainant's title as against the deed from the defendant, but it will not be proper to require the grantee in such deed to convey to the complainant.

6. *SAME--retaining cause for all purposes.* If a court of equity once acquires jurisdiction for any purpose, it will retain it for all purposes, and render complete justice between the parties.

7. *EVIDENCE--deposition in another suit.* A deposition taken in a prior suit may be read in evidence in a second suit, when the parties in interest in both suits are the same, and the issues in both suits are substantially the same.

APPEAL from the Circuit Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

Mr. E. F. ALLEN, and Mr. E. K. SMITH, for the appellants:

The possession that gives jurisdiction to a court of equity must have been acquired in a lawful way. If obtained by violence, or in an unlawful manner, the court will not lend its aid. *Comstock v. Henneberry*, 66 Ill. 212; *Hardin v. Jones*, 86 id. 313; *Gould v. Sternburg*, 105 id. 488.

Where the only question is as to which is the better legal title, and both titles can be brought before a court of law, a court of equity will not assume jurisdiction. *Booth v. Wiley*, 102 Ill. 84; *Wells v. Lammey*, 88 id. 174; *Kennedy v. Northup*, 15 id. 148.

A court of equity is not permitted to try and determine mere conflicting titles between the parties, under the pretext of removing a cloud from the title of one of them. *Scates v. King*, 110 Ill. 456.

If right to land has not been established at law, the court will not protect it by an injunction against a suit at law to recover the land. *Thornton v. Engle*, 4 N. J. Eq. 271.

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Brief for the Appellants.

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The fact that the plaintiff at law has no title or no cause of action, will not warrant relief in equity against a forcible entry and detainer suit. 1 High on Injunctions, secs. 89, 98, 325, 355.

Where a bill can not be maintained on the alleged grounds for equitable relief, and only leaves legal rights to be ascertained, the jurisdiction must fail. *Daniel v. Green*, 42 Ill. 472.

A court of equity will not relieve against ignorance of the law or advice of counsel. *Tone v. Wilson*, 81 Ill. 529.

An order or rule of court is of itself a law, and, as such, can not be changed or modified, even by the court; and a misunderstanding of an order is a misunderstanding of the law, against which a court of equity will not relieve. *Owens v. Ranstead*, 22 Ill. 161.

Before a court of equity will assume jurisdiction to avoid a multiplicity of suits, complainant must first establish his defense at law. *Insurance Co. v. Gunning*, 81 Ill. 236; 1 High on Injunctions, secs. 61, 90.

A writ of restitution will not be enjoined when the real purpose is for quiet possession and to suppress litigation; nor is title sufficient cause. 1 High on Injunctions, secs. 340, 325.

If there is an action at law pending to try the title, chancery will not take jurisdiction. *Whitney v. Stevens*, 97 Ill. 482.

If the plaintiff fails on demurrer in his first action, from the omission of any essential allegation in his declaration, which is fully supplied in his second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right. *Hughes v. United States*, 4 Wall. 232; *Gould v. Railway Co.* 1 Otto, 526.

A deposition taken in another and different cause, by consent, and to be used in that cause, but not used, is not competent evidence against one not a party to the former suit. *Cookson v. Richardson*, 69 Ill. 137.

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Brief for the Appellees. Opinion of the Court.

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Mr. H. S. MONROE, for the appellees:

The counsel has misapprehended the nature of this case. It is a bill to set aside fraudulent deeds and to quiet title. The other relief asked and granted is incidental to this, and necessary to the accomplishment of the purposes of the bill.

It is well settled in this State that a court of chancery has jurisdiction to set aside deeds procured by fraud. *Nelson v. Rockwell*, 14 Ill. 375.

Being in possession of this property, and being the owners of it, we had the right to file a bill to set aside the deed to Smith, who was claiming title and seeking to obtain possession, and quiet our title, even if that deed was void at law. *Campbell v. McCahan*, 41 Ill. 46; *Johnson v. Johnson*, 30 id. 215.

If his title was void, and he was fraudulently seeking to obtain possession, even through the instrumentalities of the law, we had the right to an injunction until our own rights were determined.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

The litigation, of which the present suit is a remnant, has been before this Court three times, as will be seen by reference to the following cases: *Stone v. Pratt*, 25 Ill. 25; *D'Wolf v. Pratt et al.* 42 id. 198; *Pratt et al. v. Stone et al.* 80 id. 440. As the respective titles of the parties to this proceeding are the same as those involved in the cases referred to, the facts as set forth in those cases, showing the manner in which such titles have been derived, will not be repeated here in detail.

This is a bill filed on March 3, 1883, in the Circuit Court of Cook County by John A. J. Kendig, Horatio Stone Jr. and Elizabeth A. Stone, trustees, duly appointed in November, 1881, as successors to the original trustees named in the will of Horatio O. Stone, deceased, who died testate on July 20, 1877, against Emily H. Pratt, James Pratt, her husband, and

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Opinion of the Court.

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E. K. Smith. It is not denied that the title, which Stone had in his lifetime to the property in controversy, has become vested in his trustees since his death. The object of the bill is to quiet the complainants' possession of certain lots in Stone's subdivision of the fifteen acres described in the opinions in the foregoing cases, to remove a cloud upon the title of part of one of said lots, and to perpetually enjoin the prosecution of pending and threatened litigation, affecting the rights of complainants in said property, and their possession of the same. The bill avers and the proof shows, that complainants are in possession of all the lots, and that their title thereto has already been established by a number of suits, to which the defendants herein, or their grantors, or representatives, were parties. The bill was answered by Emily H. and James Pratt and Smith. Emily H. Pratt filed a cross-bill claiming to be the owner of the lots, and praying that she be decreed to be such owner, that she be put in possession of the same, and that the trustees be required to account for the proceeds of the sales of lots sold by Stone, and for rents collected by him. The said Emily announces her intention in her answer to take such legal steps as may be necessary to protect her rights in the premises.

By the decree of the circuit court, which we are asked to review, it is decreed that the complainants, as such trustees, hold the title to the lots; that said cross-bill be dismissed; that the injunction be made perpetual; that the Pratts be perpetually enjoined from in any way taking possession of any part of the fifteen acres owned by the grantees of Stone, or the houses thereon, or interfering with the rights of complainants therein; that the deed from Emily H. Pratt and husband to E. K. Smith of the south 25 feet of lot 16 in Block 2 in said subdivision is null and void, and a cloud upon the title of complainants, and that Smith be perpetually enjoined from in any way interfering with their rights therein, etc.

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Opinion of the Court.

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Where a complainant has already sufficiently established his right at law, and yet is in danger of being harassed by fresh attempts to interfere with such right, a court of equity will grant a perpetual injunction to quiet his possession, and protect him against the annoyance of future suits. Courts of law, in some cases, have not the power of putting an end to vexatious and oppressive litigation, and courts of equity will assume jurisdiction in order to do so. Although it must appear that the right has already been satisfactorily established at law, before equity will interpose, "it is not material what number of trials have taken place, whether two only, or more." (Story's Eq. Jur. vol. 2, sec. 859 (12th ed.); High on Inj. (2d ed.) vol. 1, sec. 61; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Trustees of Huntington v. Nicoll*, 3 id. 566; *Dedman v. Chiles*, 3 T. B. Monroe, 426; *Woods v. Monroe et al.* 17 Mich. 238; Eden's Law of Injunctions, page 356.) We apprehend that it can make no difference whether the proceeding, in which the right has been established, is an action at law, or a suit in chancery, if the latter is one of such a character as to authorize a court of equity to adjudicate upon the legal title.

The common source of title, under which the complainants and defendants claim, is Amos Pratt. In *D'Wolf v. Pratt et al. supra*, where C. H. D'Wolf, Amos Pratt, Jeremiah Pratt and Horatio O. Stone were all parties, it was the decision of this Court, that Amos Pratt should convey his title to the fifteen acres to D'Wolf, and, in default of his doing so within a certain time, the Master in Chancery of the Circuit Court should so convey it. The Master in Chancery did make the conveyance to D'Wolf, and D'Wolf executed a deed to Stone. Appellees hold the D'Wolf title.

October 7, 1853, Amos Pratt executed a quitclaim deed of said premises to Jeremiah Pratt: November 1, 1867, Jeremiah Pratt deeded the same to the appellant, Emily H. Pratt. Appellants claim under the Jeremiah Pratt title. It was distinctly held in *D'Wolf v. Pratt et al.*, that the D'Wolf title was

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Opinion of the Court.

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the better title, and that, as against it, the deed to Jeremiah Pratt was invalid. Here was one adjudication, in which the right of Stone to this property was established as against the grantor of appellants.

In *Pratt et al. v. Stone et al. supra*, where Horatio O. Stone and the present appellants, James Pratt and Emily H. Pratt, were parties, it was again held that the title of Stone to this property was superior to the claims of said appellants thereto. Here was another adjudication, in which the right of Stone was established against all the appellants, it being admitted that Smith holds by deed from Emily H. Pratt, as hereafter stated.

It is also in proof, that the appellant Emily H. Pratt conveyed one of the lots in the subdivision of the fifteen acres to a non-resident by the name of Gallup, and that Gallup began an ejectment suit against Stone in the United States Circuit Court for the Northern District of Illinois to recover the possession of said lot. This ejectment suit was designed to be a test case for the purpose of settling the question of title between Stone and the Pratts. It resulted in a judgment by the Federal Court in favor of Stone after an exhaustive trial by able counsel; and no appeal was ever taken from the judgment. Here was still another adjudication, in which the right of Stone was established as against the claims of the present appellants.

In October, 1873, the appellant Emily H. Pratt, without the knowledge or consent of Stone, or his agents, took possession of one of the lots in question by entering into and occupying the house located thereon. It is admitted, that Stone brought suit against her to recover the possession of this house, and that he recovered judgment, and was restored to possession through the process of the Court.

That the appellees are in danger of being vexed by further litigation as to a matter that has been so often passed upon, sufficiently appears from the facts disclosed in the record. In July, 1879, the appellant Mrs. Pratt took possession of another

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Opinion of the Court.

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one of the lots in controversy in the manner hereinafter explained. Upon being ejected, she began a suit of forcible entry and detainer against the trustees of the Stone estate, and also an action of trespass for damages. At least one of these suits is still pending. It has already been stated, that, in her pleadings filed in this cause, she asserts her ownership of the lots in controversy under the same claim of title, which she and her grantors have failed to sustain in the suits above mentioned, and threatens to take legal action for the enforcement of such claim.

We think the appellees have shown that their right to these lots has been established by previous adjudications, and that they are in danger of being vexed with further controversy in relation to the same. Hence, they are entitled under the authorities, herein referred to, to come into a court of equity and ask for a perpetual injunction "to restrain repeated and vexatious litigation."

As to the south 25 feet of lot 16 in Block 2, being a part of the property in dispute, the bill alleges that complainants are in possession of it, and asks that the deed thereof to Smith be removed as a cloud, and that Mrs. Pratt be enjoined from prosecuting the forcible entry and detainer suit to get possession of it. The decree of the Circuit Court is in accordance with the prayer of the bill as to this part of the property, and is objected to by the appellants upon the alleged ground, that the possession, which the appellees hold of this 25 feet, was acquired from Mrs. Pratt by violence, and, therefore, under the doctrine announced in *Comstock v. Henneberry*, 66 Ill. 212, can not give a court of chancery jurisdiction to entertain a bill to remove a cloud.

Prior and up to July 11, 1879, Ida E. Gilliland and her husband had been occupying the house upon the 25 feet in question, as the tenants of the appellees. On that day they vacated the house, and were instructed by the agent of appellees to lock the doors and leave the keys with another tenant

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Opinion of the Court.

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living in the adjoining house. About that time Mrs. Pratt made a deed of the 25 feet to Smith, then took a lease of it from Smith to herself, and, going up to the premises, obtained one of the keys from Mrs. Gilliland and went into the house. The next day one Nichols, the agent of appellees, found Mrs. Pratt in the house. A few articles of furniture had been moved in, and expressmen were unloading household goods in the yard. The front door was locked. Nichols spoke to Mrs. Pratt through the window, and demanded possession. She drew a pistol and threatened to shoot him if he came in. He went off, and, returning with a policeman, entered the house through the back door, which was open, and through which some men were carrying furniture into the house. Nichols testifies: "After I had got into the house \* \* \* I told her that she must vacate. \* \* \* She drew her gun on me, and the policeman then arrested her and took her to the station." Thereupon, Nichols took possession of the house for the appellees, and the latter have been in possession ever since. Mrs. Pratt at once commenced the trespass and forcible entry and detainer suits, which have already been mentioned.

After a careful examination of the evidence, we are satisfied that Mrs. Pratt gained admission to the house by deceiving the tenant of appellees. On July 10, 1879, Mrs. Gilliland had agreed with Nichols to surrender possession to him, and had received from him a card, announcing the house to be for rent, to be posted on the premises. She was not aware at that time of the dispute in regard to the title. She told Mrs. Pratt that she had been directed by Nichols to leave the keys at the next house. She was induced by Mrs. Pratt to believe, that the latter was going into the house as the tenant of Nichols. If Mrs. Gilliland was not deceived, then Mrs. Pratt persuaded her to violate her agreement with her landlord, and to assist a party claiming adversely to her landlord to enter into the occupancy of the premises. (*Hardin et al. v. Jones*, 86 Ill. 313.)

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Opinion of the Court.

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We do not deem it necessary to inquire, whether the possession of appellees was or was not acquired by such violence, as would forbid its acceptance by a court of chancery as the basis of equitable jurisdiction. Such inquiry would be material, if this were a bill setting up the possession by complainants of no other property than the south 25 feet of said lot 16, and asking for no other relief than the removal of the Smith deed as a cloud upon said 25 feet. Here, however, equity takes jurisdiction, because the property involved consists of a number of lots, embraced within the original fifteen acres above referred to, and because appellees are entitled to a perpetual injunction against future litigation as to such lots, by reason of having several times heretofore established their title to the same. The 25 feet are one of said lots, and the title to the 25 feet, like the title to the rest of the property, having been already established, should be protected against new law-suits.

A court of equity, having acquired jurisdiction for one purpose, will entertain it for all purposes. Having acquired jurisdiction of all the rest of the property for the purpose of granting the broader and more general relief already specified, it will take jurisdiction of a particular part, as to which, if it alone were involved, the bill might be dismissed, in order to extend the same relief to such part. (*Woods v. Monroe et al. supra*). The character of the possession in bills to quiet title is only important as determining whether the court will entertain jurisdiction or not. Here the jurisdiction depends upon other considerations than the question of possession. If the forcible entry and detainer suit should be allowed to proceed, and Mrs. Pratt, under the judgment therein, should obtain possession of the 25 feet, appellees could at once bring ejectment against her, and be restored to the possession. The forcible entry and detainer judgment would be no bar to the ejectment suit. (*Riverside Co. v. Townshend et al.* 120 Ill. 9). But the court of equity knows in advance, that the ejectment suit must result in favor of appellees, because, in an ejectment

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Opinion of the Court.

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suit already tried, and in other proceedings already ended, appellees have been adjudged to be the owners of the property. Equity will not compel suitors to resort to unnecessary litigation, or to do over again what has been already done. We, therefore, think the decree of the Circuit Court was right in granting relief as to the 25 feet, except in the particular hereafter mentioned.

Appellants assign as error, that complainants below were permitted to read the deposition of Mrs. Gilliland, taken in another suit. The deposition was taken in the forcible entry and detainer suit between Mrs. Pratt and the trustees of the Stone estate. She appeared by counsel and cross-examined the witness. The deposition had reference solely to the possession taken by her of the 25 feet. The parties to the present suit are the said trustees, and Mrs. Pratt and her husband and Smith. But she is the real party in interest as defendant. Her husband has no interest, and Smith holds by deed from her. The issue in this case, upon which the testimony was produced, is, as it was in the other case, the character of her possession. Hence, upon the authority of *Wade et al. v. King et al.* 19 Ill. 301, it was not error to permit the deposition to be read.

Although the court below decided correctly in quieting the title of complainants as against the deed from Mrs. Pratt to Smith, we think it should have stopped there without decreeing a re-conveyance by Smith to the complainants, and the decree will stand modified to that extent, and in other respects will be affirmed. The costs of this court will be equally divided between the parties. This is in accordance with the ruling in reference to a similar decree in *Rucker v. Dooley et al.* 49 Ill. 377.

*Decree modified and affirmed.*

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Syllabus.

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## LAWSON A. WINSLOW

v.

SHERMAN LELAND, Admr. *et al.*

Filed at Ottawa May 16, 1889.

1. **ASSIGNMENT OF A JUDGMENT—*subject to what defenses.*** Judgments and decrees are not commercial paper, and assignees of such securities take them affected with all equities and defenses which might have been set up against them in the hands of the assignor. After a contract for the discharge of a judgment, and while such contract is in process of execution, the owner thereof can not, by an assignment of the same, divest or defeat the right of the debtor to a discharge under his contract, and on performance by the debtor the judgment will be satisfied as to him.

2. **SAME—*whether a satisfaction—the circumstances considered.*** Where judgments against two partners are taken up by a son of one of them, the fact that the son, as assignee thereof, claims to have the other partner charged with his proportionate share of the money actually paid for the transfer of the judgments, instead of the full amount due thereon, is a circumstance tending strongly to show that the judgments were taken up in the interest and for the benefit of the father.

3. And where the son purchases the judgments and takes an assignment thereof, if, in the subsequent adjustment of accounts between him and his father the former receives credit from the latter for all the moneys expended by him in their purchase, his interest in the judgments will be precisely the same as though the purchases had been originally made by his father with his own money and for his own benefit, and neither the son nor his assignee can collect such judgments of the father, or from his estate.

4. In this case, a son of one of two partners, after the purchase of certain judgments against the partners, agreed with the other partner to purchase his interest in the assets of the firm, and to pay him a price to be fixed by arbitrators, such partner to be charged with his share of the firm liabilities in fixing the price to be paid, and the son further agreed to assume the partner's share of such liabilities, and to save him harmless therefrom. It was held, that the agreement to keep such partner harmless from his share of the firm liabilities, including the judgments so held by the son, even if bought with his own money, operated between them as a satisfaction and discharge of the judgments, and being a discharge of one partner, it was equally so as to the other partner or joint debtor.

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Syllabus.

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5. If the assignee of a judgment against two persons agrees with one of them to save and keep him harmless from liability thereon, this will operate as a satisfaction of the judgment as to both debtors, and neither the holder of such judgment nor his subsequent assignee will, in equity, be allowed to enforce the collection of the same, and such judgment can not form the basis of a creditor's bill as against the estate of the other joint debtor. The satisfaction of a judgment as to one joint debtor is a satisfaction as to both.

6. *CREDITOR'S BILL—prerequisites—and herein, in case of the death of the judgment debtor.* A money decree in a court of equity stands upon the same footing as a judgment at law, in respect to a creditor's bill. An execution thereon must be issued, and returned no property found.

7. It is a general rule, subject to a very few exceptions, that before a bill can be filed to reach equitable assets, the creditor must first recover a judgment at law,—or what, in a proper case, would be its equivalent, a money decree in equity,—and have an execution issued, and returned unsatisfied.

8. By the death of a judgment debtor, remedies which might have been pursued in his lifetime are extinguished, and a new class of legal rights and remedies is created. His personal estate is no longer liable to sale on execution, but creditors are given the right, upon exhibiting and establishing their claims in the county court, to share in the distribution of his estate.

9. Not only is it true that when a debtor dies the law gives new legal remedies against the representatives, but the rule is imperative, that to entitle a creditor to share in the distribution of his estate, those remedies must be pursued. The creditor must exhibit and prove his claim in the court before he can be entitled to payment. In this respect judgment creditors, except so far as their judgments are liens on real estate, and simple contract creditors, stand upon the same footing.

10. The mere fact that a creditor has exhausted his legal remedies against his debtor while living, does not furnish a sufficient ground for proceeding, by creditor's bill, to reach personal estate while the administration of the estate of the debtor is in progress, especially when no fraud is charged against the intestate, and the only scope of the bill is to seek a remedy against the fraud or failure of duty of the administrator himself, and to reach property which the administrator is entitled to, but which he has failed to get into his possession.

11. By the statute, claims against estates of deceased persons are to be classified, and some may be paid in full and others *pro rata*, and a claimant can not avoid this statute by resorting to equity. A court of equity will not ordinarily assume jurisdiction until the claimant shall have exhibited his claim and had it allowed in the county court, and

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Syllabus.

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then, if any special reasons that may be deemed sufficient can be assigned why that court can not afford the requisite relief, equity will assist him, but not otherwise.

12. *SAME—as to judgment in United States Court.* A judgment in the United States Court, that being a court of another jurisdiction, can not be made the basis of a creditor's bill in a State court.

13. *ADMINISTRATION OF ESTATES—in chancery—powers of the county court—how far exclusive.* A court of chancery may, in the exercise of its general jurisdiction, take upon itself the administration of an estate. But this will be done only in extraordinary cases, and when it does, it will take the whole administration, and not merely a part of it. The fact that the administrator has, through negligence or fraud, failed to find and collect assets in the hands of surviving partners of the intestate, is not a sufficient ground for the interposition of a court of equity. In such a case, the remedy is within the powers of the county court.

14. The county court has ample power to compel an administrator to proceed properly and faithfully in the discharge of his duties. If he makes mistakes, it has power to correct them. If he has been guilty of fraud, or has wasted the estate, or has shown himself incompetent or an improper person to conduct the administration, the court has power to call him to account, or to remove him and appoint another and suitable person in his place.

15. The remedy by which the creditors of an intestate may subject the personal estate of their deceased debtor to the payment of their claims, is by due course of administration. As to all personal assets which are legally within the reach of the administrator, and upon which the creditor has obtained no lien during the lifetime of his debtor, this remedy is exclusive. All personal assets as to which the intestate was himself in a position to assert title at the time of his decease, pass to the administrator, and it is through him alone that the creditors must seek to have them subjected to the payment of their debts.

16. *SAME—abandonment or release of claim.* A covenant or agreement by a creditor of an estate with the widow and heirs, that all proceedings for the collection of his debt through the instrumentality of the administrator shall be abandoned, that the estate may be finally settled and final distribution made, wholly discharged of his claim, and releasing and relinquishing to the widow and heirs of the intestate any claim he may have to share in such distribution, is in effect a complete abandonment and release of all legal claim to have his debt satisfied out of any personal estate which the administrator has reduced to possession, or to which he is entitled as administrator.

17. In such case, it can not avail the creditor that a reservation was made in the contract of release, of the right, by other proceedings then pending or thereafter to be instituted, to enforce the collection of his

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Statement of the case.

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claim out of that of the intestate in the assets of certain firms of which the intestate was a member at his death. That interest could be reached by the creditor by due course of administration, and not otherwise, and therefore such reservation is nugatory.

18. *SAME—on the death of a partner—assignable interest of distributees.* On the death of a partner, all rights and causes of action growing out of his dealings with the firms of which he was a member, and the right to an accounting with the surviving members of such firms, are by law vested in his administrator, and not in his widow and children, and they can not transfer to a third person the right to call on such surviving members for an accounting.

19. The widow and heirs of an intestate have an assignable interest in their distributive share of the assets of the estate after the payment of debts; but that interest is wholly distinct from an interest in specific chattels upon which no administration has been had. As to the latter, they have no interest susceptible of assignment, the entire ownership, for all the purposes of administration, being vested in the administrator.

20. *LACHES—delay in attacking an accounting and settlement between surviving partners and the administrator of deceased partner.* An unexplained delay of nearly six years after the settlement of a partnership between the surviving members and the administrator of a deceased partner, during which time one of the surviving partners has died and the situation of the others has materially changed, and more or less of the evidence by which the true state of the accounts of the firm could be established has disappeared, will constitute such *laches* as will bar the widow and heirs of the deceased partner, and their assignee, of their right to attack such accounting and settlement as fraudulent and collusive.

21. *SUPPLEMENTAL BILL—in chancery.* Where a supplemental bill is filed setting up a supposed interest acquired *pendente lite*, and it appears from such bill that the assignment relied on passed no interest to the complainant capable of being asserted either at law or in equity, it will be subject to demurrer. In such case, the complainant will have no newly acquired interest which can be the basis of such a bill.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GWYNN GARNETT, Judge, presiding.

This was a bill, in the nature of a creditor's bill, brought by Lawson A. Winslow against Sherman Leland, administrator of the estate of William H. W. Cushman, deceased, Anna C. Cushman his widow, William H. Cushman, Susan C. Dickey,

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Statement of the case.

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Anna O. Glover and Mabel M. Cushman, his children, Nellie Driver, formerly Nellie Cushman, the widow and administratrix of a deceased son, Ralph Plumb, Francis E. Hinckley, Philip B. Shumway and Isaac N. Hardin, and the administrators of the estate of David Strawn, deceased. During the pendency of the suit Philip B. Shumway died, and his administrators were made parties defendant. The original bill was filed August 22, 1882, and an amended bill was filed December 29, 1882. By agreement of the parties the original bill, and all answers, demurrers, orders and other papers pertaining thereto are omitted from the transcript of the record, and the transcript is thus made to commence with the amended bill.

Issues were formed upon the amended bill by answers and replications. On the 20th day of April, 1887, the complainant filed a supplemental bill to which a demurrer was sustained. On the 25th day of the same month he filed an amendment to his amended bill which was duly answered. On the 27th day of April, 1887, Nellie Driver, as administratrix of her deceased husband George H. N. Cushman, filed her cross-bill, which was answered, and on the 24th day of October, 1887, a cross-bill was filed by Anna C. Cushman, Anna O. Glover, Susan C. Dickey and Mabel M. Cushman, to which certain pleas were interposed, and the cause coming on to be heard on pleadings and proofs, a decree was rendered dismissing the bill and cross-bills for want of equity, at the cost of the complainants therein. This decree was affirmed by the Appellate Court on appeal, and by appeal from the judgment of that court the record is brought here for review.

The bill was filed to enforce the collection of nine judgments at law and one decree in chancery, recovered by various parties, and which the complainant claims to hold and own by virtue of certain assignments thereof to him. The names of the several plaintiffs and the dates and amounts of the judgments and decree are as follows:

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Statement of the case.

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John R. Adams, Nov. 5, 1874, - - - - -	\$1,775.34
Rosenfeld & Rosenberg, Nov. 6, 1874, - - - - -	3,235.28
Salome Hathaway, Jan. 27, 1875, - - - - -	2,388.00
Elnathan P. Hathaway, Jan. 27, 1875, - - - - -	2,390.00
National Bank of Illinois, March 25, 1875, - - -	2,960.02
John E. Owsley, April 28, 1875, - - - - -	4,142.00
William M. Derby, July 7, 1875, - - - - -	2,172.28
National City Bank of Ottawa, July 1, 1876, - -	5,797.81
George Chandler, Receiver, Nov. 20, 1876, - -	148,480.00
Commercial Nat. Bank of Chicago, Dec. 18, 1876,	5,607.05

Five of these judgments, viz, those in favor of the following plaintiffs, Salome Hathaway, Elnathan P. Hathaway, the National Bank of Illinois, the National City Bank of Ottawa and the Commercial National Bank of Chicago, were recovered in the Circuit Court of the United States for the Northern District of Illinois. The other four judgments and the decree in favor of Chandler, receiver, were recovered in the Superior Court of Cook county. Executions were duly issued upon all of said judgments and returned unsatisfied, except the judgment in favor of the Commercial National Bank of Chicago, but neither upon that nor upon the decree does any execution appear to have been issued. The judgment in favor of the National City Bank of Ottawa and the one in favor of the Commercial National Bank of Chicago were recovered against William H. W. Cushman alone. Those in favor of Salome Hathaway and Elnathan P. Hathaway were recovered against Cushman, Isaac N. Hardin and Seth W. Hardin, the residue of the judgments and the decree being against Cushman and Isaac N. Hardin.

For years prior to 1871 Cushman was a resident of Ottawa, Illinois, and was a man of large wealth. He had long been engaged in business there as a banker and otherwise, and he was also engaged in the banking business in Chicago as a partner with Isaac N. Hardin under the firm name of Cushman & Hardin, Cushman's interest in the firm being one-third

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Statement of the case.

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and Hardin's two-thirds. Cushman and Hardin were also members of the lumber firm of Cushman, Calkins & Co., doing business at Manistee, Michigan, Cushman's interest in that firm being one-sixth and Hardin's one-third. They were also largely interested in real estate and other business enterprises in Chicago. The property of the lumber concern was destroyed by fire the same night of the great Chicago fire in October, 1871. Owing to the loss thus sustained, and perhaps to losses resulting from the great fire in Chicago and from the panic of 1873, and also owing to Cushman's becoming involved in railroad matters as hereinafter mentioned, the business enterprises in which Cushman and Hardin were jointly interested became greatly embarrassed. As a result, numerous suits were brought against them for indebtedness growing out of their business, which suits resulted in the judgments and decree in question, and other judgments not now in controversy.

At that time William H. Cushman, a son of William H. W. Cushman, was engaged in extensive business operations in Colorado, including banking and various mining ventures, his father being to a greater or less degree interested with him in such business. Among other things, he was the owner and president of the First National Bank of Georgetown, Colorado. The business interests of William H. Cushman were so far involved with those of his father, and indirectly with those of Cushman & Hardin, that the suits and judgments against the latter became embarrassing to him. An arrangement was thereupon entered into between him and his father by which the judgments when recovered were to be bought up and assigned to him. In pursuance of this arrangement the judgments and decree described in the complainant's bill were bought in, the actual negotiations in relation to such purchases being carried on in part by William H. Cushman and in part by his father. The judgments were bought substantially at their face, but the assignment of the decree was obtained at a large discount. They were all assigned in due form to William H. Cushman.

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Statement of the case.

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The question as to whose money was used in making said purchases is in dispute, the complainant claiming that William H. Cushman bought the judgments and decree with his own money and for his own benefit, while the defendants claim that the money used was in fact the money of his father. On this question the evidence is conflicting to this extent: The testimony of William H. W. Cushman taken October 11, 1877, in a proceeding before arbitrators which will be mentioned presently, was read at the hearing, in which he testified, in substance, that his son frequently furnished him with money to enable him to protect himself against these judgments, and that he used said money in taking up said judgments, and to secure his son for the advances, he had the judgments assigned to him; that said advances were not made by his son to him as a matter of personal accommodation upon a general account between his son and himself. William H. Cushman also in his testimony in the same arbitration proceeding, on being asked how he came to send money to his father to purchase these judgments, answered: "I don't know whether I was here in Chicago or whether it was in Colorado I received a letter from my father in which I was informed there had been certain judgments entered. They were annoying him greatly, levying upon his property and making a great deal of trouble, and I do not remember whether I arranged and purchased the first myself or whether I sent the money to him, but I know at different times I have sent him money; at other times I have authorized him to draw upon me for money to take up certain judgments and have them assigned to me. I always instructed him to have the judgments assigned to me. I furnished the money, but it was for my benefit." In a subsequent deposition, however, William H. Cushman testified, in substance, that his father procured the greater part of the assignments of the judgments and he procured the residue; that said assignments were procured for his father's benefit; that in some instances his father furnished the money and in others he

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Statement of the case.

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did; that he was indebted to his father at the time in various amounts, sometimes to a very large amount, there being a running account between them; that he understood that he was taking up the judgments for his father's benefit, and not to use for the purpose of enforcing them against his father's property; *that he received in his account with his father credit for whatever sums he paid in taking them up.*

Hardin being unable to obtain a settlement with Cushman of the co-partnership business of the firm of Cushman & Hardin, filed his bill against him in the Superior Court of Cook county for an accounting. While that suit was pending, an agreement was entered into between Hardin and Cushman, bearing date December 30, 1876, by which they agreed to submit all matters of difference between them growing out of their personal accounts with each other and with said firm, and all personal claims and counter-claims between them of every description growing out of their partnership agreement and partnership dealings, for adjustment and award, to Daniel L. Shorey of Chicago, said Shorey to determine the matters between said parties, but without taking into account any of the assets of said firm; and it was agreed that his award should be reduced to writing, and should be binding and conclusive between the parties.

On the same day the foregoing instrument was executed, an agreement was entered into between Hardin and William H. Cushman, by which the latter agreed to purchase and the former to sell all the right, title and interest of Hardin in and to the property and assets of every description of the firm of Cushman, Calkins & Co., and of the firm of Cushman & Hardin, on the following terms: The price to be paid for Hardin's interest in the property and assets of the firm of Cushman, Calkins & Co. was to be fixed and determined by the appraisal of two disinterested practical lumbermen, acquainted with the value of the property at the place where the property of said firm was situated, one of the appraisers to be chosen by each

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Statement of the case.

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party, the two to choose a third in case of disagreement, the decision of such appraisers or of any two of them to be binding and conclusive between the parties; and it was provided that, in determining the value of said interest, the appraisers should consider the property and assets of the firm of every kind and description, and all the debts and liabilities of the firm. And it was further provided that the interest of Hardin in the property and assets of the firm of Cushman & Hardin should be fixed and determined in like manner by appraisers, such appraisers to be disinterested practical business men owning property and doing business in the city of Chicago; that the last mentioned appraisers, after determining the value of the property of Cushman & Hardin and Hardin's interest in the same, should add thereto the value of his interest in the assets of the firm of Cushman, Calkins & Co. as the same should be found by the appraisers first above mentioned, and that from the amount thus ascertained, they should deduct Hardin's proportion of all outstanding liabilities of the firm of Cushman & Hardin; that in the mode above provided, the appraisers should fix and determine the amount to be paid to Hardin by William H. Cushman, and also that they should fix the terms of payment, and that their award in that behalf should be binding upon both parties. It was further provided that the award of Daniel L. Shorey in respect to the matters submitted to him in the agreement between Hardin and William H. W. Cushman above mentioned should be certified to the arbitrators appointed to appraise the interest of Hardin in the firm of Cushman & Hardin, and that such award should be received and acted upon by the arbitrators as final and conclusive of all matters submitted to and considered by said Shorey.

It was further agreed that, upon payment by William H. Cushman to Hardin of the amount to be thus fixed by the arbitrators, Cushman should be vested with all of Hardin's interest in the property and assets of both firms, subject to

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Statement of the case.

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the debts and liabilities of said firms, Cushman agreeing to assume Hardin's share of said liabilities, and to save Hardin harmless therefrom, and Hardin agreed on his part to execute to Cushman proper deeds, bills of sale and other papers, so as to fully vest in Cushman, his heirs and assigns, his, Hardin's interest in all of said property. And it was provided that if Cushman should for sixty days after the award of said arbitrators, neglect or refuse to pay the purchase money or execute and deliver the notes therefor as provided by said arbitrators, the whole amount awarded by the arbitrators should become at once due and payable, and Hardin might cause judgment to be entered up in any court of record for the full amount of the purchase price fixed and determined by the arbitrators, and for that purpose, authority was given to any attorney of any court of record to appear for said Cushman and confess judgment for the amount so awarded. And it was in said agreement declared that the purpose of said submission and arrangement was, to effect an amicable and final adjustment of all matters of difference between said Hardin and William H. W. Cushman, and to bring to an end all litigation then pending between them, by a sale to said William H. Cushman of the interest of Hardin in all the property in which said William H. W. Cushman and said Hardin were then jointly interested.

A third agreement supplementary to the two agreements above set forth was executed by Hardin, William H. Cushman and William H. W. Cushman, in which it was agreed that Shorey's award, when completed, should be furnished to the arbitrators to be appointed under the agreement between Hardin and William H. Cushman, and that said arbitrators should receive said award and be governed thereby, and that in case any amount should be found by said Shorey to be due from Hardin to William H. W. Cushman, and the same should be allowed by the arbitrators in their award of the amount to be paid by William H. Cushman to Hardin, William H. Cushman

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Statement of the case.

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should assume Hardin's liability to William H. W. Cushman upon the Shorey award, and William H. W. Cushman should accept such liability in full discharge of Hardin therefrom.

Shorey made his award in relation to the matters submitted to him, finding a balance due from Hardin to William H. W. Cushman of \$1228.81. The arbitrators appointed to appraise Hardin's interest in the assets of the firm of Cushman, Calkins & Co. made their award fixing the value of said interest at \$32,450.70. The arbitrators appointed to appraise Hardin's interest in the assets of the firm of Cushman & Hardin and to strike a general balance giving the total value of his interest in all the assets pertaining to the various enterprises in which he was interested jointly with William H. W. Cushman, made their award, and in doing so, they charged Hardin with his proportion of the moneys expended by the Cushmans in the purchase of the several judgments and the decree above mentioned, and his proportion of all the indebtedness of the firm of Cushman and Hardin, and also with the amount of the Shorey award, and credited him with the amount of the award of the Michigan arbitrators as to the value of Hardin's interest in the assets of the firm of Cushman, Calkins & Co. After these various adjustments, the amount awarded as the net value of Hardin's interest in both firms was \$18,465.01, and the award required William H. Cushman to pay that sum to Hardin in cash, with interest from the date of the award at the rate of ten per cent per annum.

After the foregoing agreements for arbitration were signed and while the arbitrations were in progress and before the final award, William H. Cushman assigned three of the judgments above described, viz., those in favor of Salome Hathaway, John R. Adams and Rosenfeld & Rosenberg, to the receiver of the City National Bank of Chicago, as collateral security for certain indebtedness. He also about the same time obtained a loan from Stephen V. White of New York of \$55,000, and deposited with him as security for such loan, ninety thousand

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Statement of the case.

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shares, of the nominal value of \$10 per share, of the capital stock of the Hukill Gold and Silver Mining Company of Colorado, and also, in addition to certain other collaterals, assigned to White the residue of said judgments and said decree. About the time the award was made William H. Cushman became insolvent, and consequently the amount of the award was not paid by him to Hardin. At the expiration of six months from the date of the award, Hardin caused a judgment to be entered against him in pursuance of the warrant of attorney contained in the arbitration agreement, for the amount of the award and interest. An execution having been issued on said judgment and returned unsatisfied, Hardin filed a creditor's bill against William H. Cushman, William H. W. Cushman and others, for the purpose of satisfying his judgment out of the equitable assets of his debtor.

The receiver of the City National Bank had in the meantime sold certain real property of William H. W. Cushman under a judgment in favor of Loomis & Follett which had also been assigned to him by William H. Cushman. Said receiver thereupon, for the purpose of obtaining a release of the lands thus sold from the lien or supposed lien of Hardin's creditor's bill, obtained an order of court authorizing him to assign said three judgments in consideration of such release, and in pursuance of that order, the three judgments were assigned to Lawson A. Winslow, the complainant in this case, it being now claimed that Hardin had previously assigned to him the judgment upon which the creditor's bill was based.

Cushman's loan from White was not paid at maturity, and White advertised and sold the mining stock pledged as collateral thereto, and the same was struck off for \$50,000, White's agent making the bid and becoming the purchaser. After the sale White claimed, as against Hardin, that he had a right to hold the judgments and decree assigned to him, as security for the payment of the residue of the loan and interest. It appears, however, that by certain subsequent transactions, he

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Statement of the case.

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realized out of the mining stock enough to repay him the entire loan and more, and he accordingly notified William H. Cushman that, as against him, he would not claim to hold the judgments and decree as further security. A receiver was appointed in the matter of Hardin's creditor's bill, and said bill was afterward amended so as to make White a party defendant, and to pray that he be required to turn over to said receiver the judgments and decree in his hands. Upon a stipulation that no personal decree should be rendered against him nor any decree inconsistent with his answer, he consented to come and enter his appearance and submit himself to the jurisdiction of the court. By his answer he set up that he held said judgments and decree as security for a balance of \$5000 and interest yet remaining due and unpaid on the Cushman loan, and consented to surrender them to the receiver on condition that the amount thus claimed to be due him should be first paid out of the proceeds thereof. An order was entered finding White's interest in the judgments and decree to be as alleged in his answer, and he was required to surrender them to the receiver, his priority of right to the proceeds being preserved. The judgments and decree were accordingly surrendered and assigned by White to said receiver, and afterwards they were sold by the receiver at auction, Winslow, the complainant, becoming the purchaser. The sums bid therefor were scarcely more than nominal. Thus the amount bid for the decree for \$148,480 was \$10; the amount bid for five of the judgments, aggregating \$20,928.82, was \$3 apiece or \$15 in all. For two of the judgments, viz., the one in favor of El Nathaniel P. Hathaway and the one in favor of the National Bank of Illinois, \$50 each was bid. The entire amount for which the judgments and decree were sold was \$125. Said sale took place June 26, 1879, and the assignment of the three judgments to Winslow by the receiver of the City National Bank took place at about the same time.

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Statement of the case.

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William H. W. Cushman died intestate October 28, 1878. He left policies of insurance on his life amounting to about \$25,000, which before his death he had assigned to William H. Cushman to be held in trust for the benefit of Mrs. Anna C. Cushman, the wife of William H. W. Cushman. Hardin, by his creditor's bill, sought to subject said policies of insurance to the payment of his judgment, on the allegation that they were the property of William H. Cushman, his judgment debtor. In this he was defeated, it being decided at the hearing of his bill that William H. Cushman had no beneficial interest in the insurance money, but merely held it as trustee. Upon the decision of Hardin's case, Winslow filed a creditor's bill based upon the judgments which he had obtained by assignment, making William H. Cushman, the trustee, Anna C. Cushman, the beneficiary, the insurance company and others parties defendant, seeking thus to reach the insurance money and have it applied to the satisfaction of his judgments. Upon the hearing of this case also the decree was adverse to the complainant therein.

Letters of administration upon the estate of William H. W. Cushman were issued by the county court of La Salle county to Sherman Leland, and he duly qualified as such administrator. In December, 1880, which was less than two years after letters of administration were granted, Winslow exhibited his claim against said estate as assignee of said judgments and decree, by filing such claim in said county court. Said claim was never proved up or allowed, but remained pending until May 22, 1885, when it was dismissed by the county court on its own motion for want of prosecution.

After the adverse decision of Winslow's suit to subject the moneys payable on said insurance policies, to the payment of his judgments, the present bill was filed for the purpose of reaching and subjecting to the payment of his judgments and decree the interest of William H. W. Cushman in the Midland Construction Company, a copartnership of which he was a

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Statement of the case.

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member at the time of his death. The history of said copartnership, as shown by the record, is briefly as follows: In February, 1871, Ralph Plumb, Francis E. Hinckley and Philip B. Shumway formed a copartnership under the firm name of Ralph Plumb & Co., for the purpose of building the Bloomington and Ohio River Railroad, and built about thirty miles of their road, but were unable to proceed further without financial assistance. Shortly prior to this, Cushman, Plumb and David Strawn had formed a copartnership, under the firm name of D. Strawn & Co., for the purpose of building the Fairbury, Pontiac and Northwestern Railway, of which they also built about thirty miles. Cushman was then considered a man of large wealth, and the firm of Ralph Plumb & Co., being unable to proceed further, it was proposed that the two firms and the two railroad enterprises be consolidated. This proposition was carried into effect, the two firms being consolidated under the name of the Midland Construction Company, and the two railroads under the name of the Chicago and Paducah Railroad Company. It was then proposed to continue the construction of the consolidated railroad from its southern terminus to some point where it would connect with the line of the Chicago, Rock Island and Pacific Railroad.

The members of the original firms were equal partners in their respective firms, but in consolidating the two firms, the interest of Ralph Plumb & Co. was valued at six-tenths and that of D. Strawn & Co. at four-tenths. Some changes were subsequently made in the individual interests of some of the partners, and there is some controversy as to how their interests were arranged at the time of Cushman's death.

To obtain money to continue the building of the road, bonds of the consolidated railroad company were issued and negotiated to a large amount, and some contributions of cash were made by individual members of the firm. Hinckley contributed between \$40,000 and \$50,000, and Cushman contributed \$40,000 at one time and \$70,000 at another. Plumb had

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Statement of the case.

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already contributed about \$40,000 to the construction of the Bloomington and Ohio River Railroad. Of these advances the \$70,000 advanced by Cushman was secured to him by the promissory note of his copartners, and that note seems to have been outstanding and unpaid at the time of his death.

The consolidated firm proceeded with the construction of its road until it had about one hundred and sixty-five miles of road built, equipped and in operation, the northern terminus of its road being at a station known as Strawn. The road thus built failed to pay operating expenses, and the railroad company was in default in the payment of interest on its bonds. A suit was thereupon brought against said company in the Circuit Court of Effingham county in which a receiver was appointed. That suit was afterwards removed to the Circuit Court of the United States for the Southern District of Illinois, and proceedings were there instituted for the foreclosure of the deed of trust securing said bonds, for the benefit of all the bondholders. At that time the railroad company and the construction company were both practically bankrupt.

While said foreclosure proceedings were pending, the Wabash Railway Company was seeking to complete its line of railroad from St. Louis to Chicago, and negotiations were thereupon entered into looking to a transfer of the Chicago and Paducah Railroad to that company to be utilized by it as a part of its Chicago line. An agreement in furtherance of such transfer was entered into October 10, 1878, eighteen days before Cushman's death, between the Wabash Railway Company of the first part, the Decatur and State Line Railway Company of the second part, and Ralph Plumb of the third part. The Decatur and State Line Railway Company was a corporation owning a franchise to build a railroad a part of the proposed line of which extended from Strawn, the northern terminus of the Chicago and Paducah Railroad, to Bremen, a station on the line of the Chicago, Rock Island and Pacific Railway, but which had then done but little towards building any portion

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Statement of the case.

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of its road. Plumb, in entering into the agreement, professed to act on his own behalf as a bondholder of the Chicago and Paducah Railroad Company, and on behalf of the other bondholders of that company. It was provided by the agreement, among other things, that the Decatur and State Line Railway Company should, within a certain time, build and complete its road from Strawn to Bremen, and for that purpose, that it might issue its bonds to the amount of \$14,400 per mile; that Plumb should cause the Chicago and Paducah Railroad to be sold under the foreclosure proceedings, and that said road should be bought in by himself and those in community of interest with him as bondholders; that the purchasers should organize themselves into a railway company, and when organized, should consolidate with the Decatur and State Line Railway Company; that the Wabash Railway Company should thereupon issue and deliver to trustees its bonds at the rate of \$14,400 per mile for each mile of the road belonging to the consolidated company, and the consolidated company should thereupon execute and deliver to such trustee its mortgage upon its entire line of railroad to secure said bonds, such mortgage to be a first lien thereon; that the consolidated corporation should thereupon become consolidated with the Wabash Railway Company; that the holders of the bonds issued by the Decatur and State Line Railway Company might then exchange their bonds for an equal amount of the bonds of the Wabash Railway Company in the hands of said trustee, and that the holders of the bonds of the Chicago and Paducah Railroad Company might exchange their bonds for the said bonds of the Wabash Railway Company in the proportion of four of the former for three of the latter, all coupons for accrued interest on the Chicago and Paducah bonds to be detached and cancelled, and that to further secure said new bonds a certain per cent of the gross earnings of a certain portion of the Wabash Railway should be set apart as a fund for their payment. This contract was followed by a contract dated November 15, 1878,

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Statement of the case.

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between various of the bondholders of the Chicago and Paducah Railroad Company, in furtherance of the scheme proposed by the preceding contract, and providing a mode in which said bondholders might avail themselves of its provisions.

The project proposed by the foregoing contracts was subsequently abandoned, and in lieu thereof a new contract was entered into between the Wabash Railway Company and Plumb, dated June 9, 1879, in which Plumb covenanted for himself and his associate bondholders, to purchase the Chicago and Paducah Railroad at the foreclosure sale, and then organize themselves into a railway corporation; and in which Plumb covenanted for himself, that he would, under the charter of the Decatur and State Line Railway Company, or under a charter procured expressly for that purpose, build a railroad upon a route to be approved by the Wabash Railway Company, from Strawn to some point at or near the Stock Yards in the city of Chicago; that the company owning said new road should thereupon become consolidated with the company then owning said Chicago and Paducah Railroad, and that the Chicago and Paducah Railroad and the extension thereof to Chicago should then be transferred to the Wabash Railway Company, and that in payment therefor the Wabash Railway Company should issue its bonds, secured by a first mortgage on the entire road, and also secured by a pledge of a certain per centage of the gross earnings of a certain portion of the Wabash Railway, to the amount of \$20,000 per mile on said new road from Strawn to Chicago, and \$14,400 per mile on the residue of said road, said bonds to be distributed as follows: To the holders of the bonds of the Chicago and Paducah Railroad Company in the proportion of four of the last named bonds for three of the bonds of the Wabash Railway Company, and to Plumb and his associates, bonds to the amount of \$19,000 per mile of the newly constructed road, the residue of the bonds to be applied to the payment of the costs of the foreclosure suit, counsel fees, and other expenditures incident to the transfer of said property.

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Statement of the case.

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The last mentioned agreement was performed by the parties thereto, the Chicago and Paducah Railroad being purchased at the foreclosure sale by Plumb and his associates, the extension of said road to Chicago being built by Plumb, and the consolidated road being turned over to the Wabash Railway Company and being paid for as provided in said agreement.

Strawn died intestate in September, 1873, and Hinckley ceased to be a member of the Midland Construction Company some time before the death of Cushman, his interest having been transferred to Plumb. The fact seems to be unquestioned that the transaction by which the Chicago and Paducah Railroad and its extension were turned over to the Wabash Railway Company was largely beneficial to the business interests of the Midland Construction Company, and that the affairs of that company were thereby rescued from what threatened to be irretrievable insolvency. The complainant now claims, first, that upon a proper accounting and settlement of the partnership affairs and business by the surviving partners, it will appear that a large sum of money is due to the estate of Cushman as its distributive share of the assets of the copartnership, and, second, that said estate is entitled to share in the profits realized by Plumb from his construction of the railroad from Strawn to Chicago. Both of these propositions are contested by the defendants.

When Cushman's administrator entered upon the duties of his office, he found the estate insolvent. The \$70,000 note executed to Cushman by his copartners, and which had never been paid, was nowhere to be found, and never came into the administrator's possession. None of Cushman's books of account later in date than 1872 were discovered. After considerable negotiations with Plumb and Shumway, he obtained from them in the spring of 1881 a statement of the assets and liabilities of the copartnership, and of the account of Cushman as a member thereof. In that account Cushman was credited with the full amount of the \$70,000 note which had disap-

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Statement of the case.

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peared, but the statement showed a balance against Cushman of about \$20,000. Plumb and Shumway thereupon offered, as a full settlement with the estate of Cushman, to cancel the indebtedness of the estate for the balance shown by the account thus rendered, and in addition thereto, to pay to the administrator the sum of \$3500. This offer the administrator took into consideration, and it being apparently fair, and there being no means within his reach to show the contrary, he accepted it, and presented a petition to the County Court of La Salle county for authority to make a settlement with the surviving partners on that basis, and to release Plumb and Shumway from all liability to the estate on payment of the sum offered. Due notice of the presentation of the petition was given by publication, and on a hearing of the petition had May 21, 1881, the matter was considered by the court, and an order was entered authorizing a settlement to be made as prayed for in the petition. Plumb and Shumway then paid the administrator \$3500, and the administrator, in pursuance of said order of the county court, executed to them a release and discharge of their liability to the estate growing out of the affairs of the Midland Construction Company.

The order also directed the administrator, in case of the filing of any bill for the settlement of the partnership, to consent to a decree declaring the copartnership settled and the copartners and their legal representatives discharged from all liability to each other. A bill was accordingly filed in the Circuit Court of La Salle county, to which Plumb, Shumway, Cushman's administrator, Hinckley and Strawn's administrators were made parties. To that bill the account rendered by Plumb and Shumway was attached as an exhibit. On the bill thus filed a decree was entered, Cushman's administrator consenting thereto, formally declaring a final settlement of the partnership and discharging the copartners from all liability to the estate of Cushman. That decree was entered June 21, 1881.

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Statement of the case.

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On the 27th day of April, 1883, Plumb and Shumway filed their answer to the complainant's amended bill in this case, in which they set up and pleaded their settlement with Cushman's administrator, and the proceedings in the county court and also the decree in the circuit court declaring the copartnership settled and discharging them from all liability to the estate of said Cushman. No attempt was made by the complainant to question the validity of said settlement and discharge until April 20, 1887, when he presented a supplemental bill and also an amended bill in which he charged, among other things, that said proceedings in the county and circuit courts of La Salle county were collusive and fraudulent.

On the 31st day of August, 1886, Lawson A. Winslow, Isaac N. Hardin and Gertrude H. Hardin, of the first part, executed under their hands and seals an agreement with Anna C. Cushman, Anna O. Glover, Susan C. Dickey and Mabel M. Cushman, of the second part, in which said parties of the first part, in consideration of \$3500, released certain specific property from all claims and liens they might have upon the same, and which agreement also contained the following provisions:

"And the said parties of the first part, for and in consideration aforesaid, hereby further expressly stipulate and agree, that any and all claims filed by them or either of them in the Probate Court of La Salle county, or in the late County Court of La Salle county, Illinois, against the estate of William H. W. Cushman, deceased, shall be withdrawn and dismissed, and all proceedings for the collection thereof in said Probate Court shall be abandoned; and that no obstacles whatever shall be interposed by the said parties of the first part or either of them to the final settlement of the estate of William H. W. Cushman, deceased, in the said Probate Court of La Salle county, Illinois, and that said estate may be fully and finally settled, as in due course of administration, wholly discharged of any claim in law or equity by the said parties of the first part or either of them against the same, and hereby release

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Statement of the case.

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and relinquish to the said parties of the second part, for the consideration aforesaid, any claims they or either of them now have or may have, to share in the general distribution of said estate. And said parties of the first part further stipulate that a final settlement by the administrator of said estate and the distribution of the proceeds thereof, in said Probate Court of La Salle county, may be had and made, discharged of any and all claims whatsoever of the said parties of the first part, or either of them, in law or equity, to any part or parcel thereof; reserving, nevertheless, unto the said party of the first part, the right, by any proceedings now pending or which may hereafter be instituted, in any court of law or equity, to foreclose a certain mortgage given by said William H. W. Cushman and wife to Stephen V. White, \* \* \* and also to enforce the collection of any judgment or decree or other valid claims they or either of them may have had against the said William H. W. Cushman during his lifetime, or may now have against his legal representatives since his decease, by subjecting to the payment thereof any interest which the said Cushman in his lifetime had, or which his legal representatives may now have, in any causes of action or dealings between said William H. W. Cushman and the late firm of Ralph Plumb & Company, and D. Strawn and Company, and the Midland Construction Company, and the respective railroad companies with the building of whose roads said firms were specially connected, or any such claims or causes of action so existing or which may have so existed against said Plumb, Philip B. Shumway, Francis E. Hinckley, or any or either of them for moneys or securities due or belonging to said Cushman in his lifetime, or his legal representatives since his decease, or in which they or either of them may be interested, whether heretofore proceeded for by the said parties of the first part or not: provided that in no event shall any personal judgment or decree be taken or rendered against said parties of the second part or either of them."

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Statement of the case.

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At the same time the foregoing instrument was executed, the persons named therein as the parties of the second part, executed to Winslow an instrument by which, in consideration of one dollar and other good and valuable considerations to them in hand paid, they sold, transferred and set over to said Winslow, all and singular their claims or causes of action growing out of the business and dealings between Cushman and the several firms above named and the railroad companies in the construction of whose roads those firms were interested, and the causes of action in favor of Cushman or his representatives against the members of said firms, and also their right to a further accounting by the members of said firms or any of them for moneys or securities belonging to said Cushman, or in which he was or might have been interested, whether theretofore proceeded for by said Winslow or not.

On the 24th day of October, 1887, a cross-bill was filed in the names of Anna C. Cushman, Susan C. Dickey, Anna O. Glover and Mabel M. Cushman, setting up substantially the same matters alleged in Winslow's supplemental and amended bills, and praying that the order of the county court and the decree of the circuit court of La Salle county be set aside, and that a receiver be appointed, and an account be taken of all of said partnership dealings, and that the amount found due from said surviving partners to the estate of Cushman, be decreed to be paid over, and that after the payment of the debts of Cushman, the shares of the complainants in the cross-bill to the surplus be paid over to them.

On the 2d day of December, 1887, Plumb and Shumway's administrators, Shumway then being dead, procured from the complainants in the cross-bill an instrument in writing, executed under their hands and seals, in which said complainants, parties of the first part, in consideration of \$4000 to them in hand paid, assigned, transferred and set over to Plumb and Shumway's administrators, parties of the second part, all the right, title and interest of the parties of the first part in the

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Statement of the case.

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personal estate of William H. W. Cushman, deceased, and appointed the parties of the second part and their assigns, their true and lawful attorneys, irrevocable, to collect and receive their distributive share of said personal estate for the sole use of the parties of the second part, and to receipt for the same, and to execute in the name of the parties of the first part to the administrator of said estate, a release of all his liability to the parties of the first part growing out of or connected with his administration of said estate.

In pursuance of this authority, Plumb and Shumway's administrators executed to Cushman's administrator a release of all his liability to the widow and daughters of Cushman growing out of or connected with the administration of said estate, and the above agreement and the release executed thereunder were pleaded in bar of the cross-bill. Said plea being set down for argument was sustained, and no replication being filed, the cross-bill was dismissed at the hearing.

The cross-bill of Nellie Driver, which was filed April 27, 1887, attacks the settlement between Cushman's administrator and Plumb and Shumway upon the same grounds set up by Winslow in his supplemental and amended bills, and prays for an accounting, a payment of the debts of Cushman, and a final distribution. The answers to said cross-bill reaffirm the validity of the settlement, and set up laches.

The evidence tends to show that both of the cross-bills were in fact filed by Winslow, in the name of the complainants therein, but in his own interest and for his own benefit. It is also insisted by Plumb and the administrators of Shumway, that Winslow, the complainant, took the assignment of the judgments and decree set up in his bill, and holds the same really for the benefit of Hardin, and that the bill was filed and the litigation is being carried on in Hardin's interest, and the evidence to some degree supports that contention.

The remaining facts necessary to a proper understanding of the case are sufficiently stated in the opinion of the court.

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Brief for the Appellant.

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Mr. EDWARD R. SWETT, Mr. LEONARD SWETT, Mr. P. S. GROSSCUP, and Mr. F. D. WINSLOW, for the appellant:

The settlement made by Plumb and Shumway with the Cushman estate was fraudulent. An imposition was practiced upon the county and circuit courts, and a court of equity has power, in the first instance, to set aside the decree of the circuit court, which was obtained by fraud, and to award an accounting.

The right to maintain this suit was not conditioned upon the allowance of the claim in the county court. *Russell v. Clark's Exrs.* 7 Cranch, 71; *Miller v. Davidson*, 3 Gilm. 523.

Jurisdiction of trusts, and the administration of estates on account of mismanagement, is primary and original in courts of equity. Story's Eq. Jur. secs. 547, 548; Pomeroy's Eq. sec. 1152; Bispham's Eq. sec. 529; *Norsheimer v. Roebuck*, 23 N. J. Eq. 46; *Hogans v. Walker*, 14 How. 33; *Freeland v. Dazey*, 25 Ill. 294; *Townsend v. Radcliffe*, 44 id. 446; *Steere v. Hoagland*, 39 id. 266; *Insurance Co. v. Guderyahn*, 20 Bradw. 161.

Unliquidated indebtedness could not be set off against the judgments. Waterman on Set-off, sec. 347; *Swift v. Prouty*, 64 N. Y. 545; *Smith v. Briggs*, 9 Barb. 252; *Harris v. Palmer*, 5 id. 105.

The representative of W. H. W. Cushman can not dispute the title of complainant to the judgments. One who willfully or negligently enables another to hold himself out to the world as owner by furnishing him with the documentary evidence of title, will be estopped. Herman on Estoppel, sec. 979; *Wood's Appeal*, 92 Pa. St. 379; *Morris v. Preston*, 93 Ill. 215; *Tucker v. Conwell*, 67 id. 552.

It is not necessary that the act or declaration should have been made with a view to influence the conduct of the particular person injured. *Drew v. Kimball*, 43 N. H. 282; Herman on Estoppel, sec. 767.

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Brief for the Appellees.

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The purchase of Hardin's interest in the several co-partnerships, by W. H. Cushman, at the time he was the owner of the judgments, does not operate in law as an extinguishment or satisfaction of such judgments.

The interest in the next of kin, in the estate of W. H. W. Cushman, was assignable. Schouler on Personal Prop. sec. 560; 15 N. Y. 436.

It is the settled doctrine of the courts that an heir may, for a fair and adequate consideration, assign his expectation of an estate, even while the ancestor is living, from which it would seem to follow that his estate would be assignable when, upon the death of the ancestor, it became not merely an expectant, but a vested, interest. *Bayler v. Commonwealth*, 40 Pa. St. 43; *Stovel v. Eichenheimer*, 46 Barb. 84; 3 Keyes, 620.

Mere expectancies of property are assignable. (*Mitchel v. Winslow*, 2 Story, 630.) In fact, the rule seems to be, that all interests are assignable which in case of the death of the party holding them would descend to his representative. *Dedman v. Mayer*, 63 N. Y. 15; *White v. Thompson*, 5 id. 347; *Quinn v. Moore*, 15 id. 436.

Appellant has not been guilty of *laches*.

Mr. H. T. GILBERT, and Mr. EDWARD O. BROWN, for the appellees:

The judgments are satisfied, and even if not, W. H. Cushman, at the time he assigned them, had no standing in a court of equity. (*Winans v. Graves*, 43 N. J. Eq. 263.) Cushman's administrator is not estopped.

The law is well settled, that the assignee of a judgment occupies no better position than his assignor. (*Padfield v. Green*, 85 Ill. 529; *Himrod v. Baugh*, id. 435; *Rea v. Forrest*, 88 id. 275; *Winans v. Graves*, 43 N. J. Eq. 263.) Hence, as W. H. Cushman could not, at the time he assigned the judgments, have enforced them against either Hardin or his father by the aid of a court of equity, so neither can Winslow, unless he

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Brief for the Appellees.

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can successfully establish that the administrator of W. H. W. Cushman is estopped, in some way, from insisting that the judgments are in fact paid and satisfied, or that W. H. Cushman's conduct was fraudulent.

An *estoppel in pais*, however, can only be set up as a means to prevent injustice,—as a shield, not as a sword. To conclude a party by an *estoppel in pais*, there must be on his part a fraudulent purpose, or his acts must produce a fraudulent result, and there must be a change of conduct, induced by the acts of the party sought to be estopped, to the injury of another. If the element of fraud or injury is wanting, there can be no estoppel. *Thomas v. Bowman*, 29 Ill. 426; *Daridson v. Young*, 38 id. 145; *Flower v. Elwood*, 66 id. 447; *Railroad Co. v. Shunick*, 65 id. 223.

Winslow's bill can not be maintained because his claim has never been allowed by the probate court. As assignee of the judgments against Cushman, he occupies no better position than that of a simple contract creditor. In the distribution of the assets of deceased persons, judgment creditors without a lien, and contract creditors, are put upon the same footing. Before any of the assets of the estate can be applied toward their payment, their claims must be presented to and allowed by the probate court as valid claims. In this they differ from judgments rendered in the circuit court against an administrator, which require no allowance by the probate court. *Turney v. Gates*, 12 Ill. 142; *Paschall v. Hailman*, 4 Gilm. 285; *Reitzell v. Miller*, 25 Ill. 67; *Clingman v. Hopkie*, 78 id. 155; *People v. Allen*, 8 Bradw. 21.

Even if the object of Winslow's bill were to impeach a fraudulent transaction of William H. W. Cushman in his lifetime, or, in other words, to reach assets that could not be reached by the administrator, it would nevertheless not lie, because Winslow's claim has never been allowed by the probate court. *Blanchard v. Williamson*, 70 Ill. 651; *White v. Russell*, 79 id. 155; *Hall v. Black Bros.* 21 Bradw. 294; *Scripps v. King*, 103

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Opinion of the Court.

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Ill. 469; *Estes v. Wilcox*, 67 N. Y. 264; *Dormueil v. Ward*, 108 id. 216; *Gore v. Kramer*, 117 id. 176.

Winslow is barred of relief by his contract of August 31, 1886, with Anna C. Cushman and daughters. He is barred of equitable relief by *laches*.

The law of *laches*, as applicable to the case at bar, is clearly laid down in the following cases: *Harwood v. Railroad Co.* 17 Wall. 81; *Badger v. Badger*, 2 id. 95; *Brown v. County of Buena Vista*, 95 U. S. 157; *Wood v. Carpenter*, 101 id. 140; *Propeller "Mohawk,"* 8 Wall. 162; Story's Eq. Jur. sec. 529.

An executor or administrator may dispose of the personal estate, and may assign a promissory note payable to his intestate. (*McConnell v. Hodson*, 2 Gilm. 640; *Makepeace v. Moore*, 5 id. 474.) He also has power to compromise a suit brought to recover damages for the death of his testate or intestate. *Henchey v. City of Chicago*, 41 Ill. 136.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

The record in this case is voluminous and complicated, and various questions, both of fact and of law, have been presented and elaborately argued. Without attempting to travel over the entire ground covered by counsel in their briefs, we shall content ourselves with a consideration of those questions only which seem to us to be decisive of the case. We have reached the conclusion that the judgment of the Appellate Court should be affirmed, and such affirmance may, in our opinion, be placed upon either one of several distinct grounds.

The first point made is, that the judgments and decree upon which the complainant's bill is based have been satisfied, or at least, that they have been so dealt with by the parties as to be no longer available as evidence of a subsisting claim against the estate of William H. W. Cushman, deceased. This point involves the contention, first, that when said judgments and decree were purchased by William H. Cushman, such pur-

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Opinion of the Court.

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chases were made for the benefit and with the money of William H. W. Cushman, and, second, that if the money used in fact belonged to William H. Cushman, his subsequent transactions with Isaac N. Hardin, who was jointly liable with William H. W. Cushman on said judgments and decree, resulted in a satisfaction of the indebtedness evidenced thereby, or at least, should be held to estop William H. Cushman and his assignee from attempting to enforce them as against either debtor.

Whether the money expended in the purchase of the judgments and decree was really the money of William H. Cushman or of his father is a question of fact upon which the evidence is conflicting. The chancellor before whom the cause was heard having found the issues in favor of the defendants, it will be presumed, in support of his decree, that upon this proposition the conflict was resolved in their favor. Unless, therefore, we are able to see that the preponderance of the evidence is clearly the other way, the finding of the chancellor should not be disturbed.

The principal witness upon this matter was William H. Cushman himself, and the difficulty grows out of the fact that, being examined on two different occasions, he gave evidence on this point which, apparently at least, is conflicting. The first occasion was when he was examined as a witness before the arbitrators chosen to appraise Hardin's interest in the assets of the firms in which he was a copartner with William H. W. Cushman. On the second occasion he was called as a witness in the matter of a creditor's bill brought by the complainant in this case by which he was endeavoring to reach the moneys payable on the policies of insurance on the life of William H. W. Cushman and apply the same to the satisfaction of said judgments and decree. On both occasions his testimony shows that the actual transactions by which the judgments and decree were purchased were carried on partly by himself and partly by his father. Before the arbitrators, his testimony

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Opinion of the Court.

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was to the effect that he furnished all the money used both by his father and himself, the money used by his father being furnished by him, partly by remittances and partly by paying drafts drawn on him by his father, and that the purchases were all made for the witness' benefit. When examined as a witness in the matter of the creditor's bill, he testified that the purchases were made in the interest and for the benefit of his father; that the money was furnished partly by himself and partly by his father; that there was a running account between them, and that he received on his account with his father, credit for whatever sums he paid in making said purchases. William H. W. Cushman was also examined as a witness before the arbitrators, and his testimony, though not very explicit, is to the effect that his son frequently furnished him money to buy the judgments, and that he had them assigned to his son as security for his advances, and that said advances were not made as a matter of personal accommodation upon a general account between himself and his son.

It should be observed that, in the matter pending before the arbitrators, the question whether the money of William H. Cushman or of his father had been used in the purchase of the judgments, or whether the judgments had been paid and satisfied or not, was of very little materiality. The arbitrators were seeking to ascertain the net value of Hardin's interest in the assets of the firms of which he was a member, and in the accounting by which such value was to be arrived at, Hardin was liable to be charged with his proportionate share of said judgments, whether the transaction by which they had been taken up by the Cushmans was in fact a purchase or a payment.

There is only this view in which the question could be material. If the judgments were satisfied, Hardin was chargeable with only his proportionate share of the money actually expended in paying them, but if they had been purchased by William H. Cushman and were held by him adversely to the

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Opinion of the Court.

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defendants therein, he was entitled in the statement of the account, to have Hardin charged with his proportionate share of the full amount of the judgments and decree. It seems however that William H. Cushman claimed only to have Hardin charged with his proportionate share of the money actually paid, and that the account was stated by the arbitrators on that basis. The decree was bought in for only about twenty per cent of its face, and only Hardin's proportionate share of that sum was charged against him. This circumstance of itself tends strongly to support the view that the judgments and decree were taken up in the interest and for the benefit of William H. W. Cushman, for if his son in fact bought them with his own money and for his own benefit, no reason is shown why he should be willing to accept a credit for only Hardin's share of the money actually paid, instead of charging Hardin with his share of the full amount due.

The question as to whose money was used not being material in the arbitration matter and arising there only incidentally, was not carefully investigated, and the witnesses were not fully examined in relation thereto. In the matter of the creditor's bill, however, the question as to whether the judgments and decree had been satisfied was directly in issue, and there William H. Cushman seems to have been questioned more fully, and he there disclosed a fact upon which neither he nor his father seems to have been interrogated on the former occasion, viz., that in the adjustment of accounts between him and his father, he had received credit for all the moneys expended by him in the purchase of the judgments and decree. Upon this one point he is nowhere contradicted, and if his statement is true, it is of little consequence who furnished the money in the first instance, or whether the intention of the parties at the time the purchases were made was that William H. Cushman should take and hold the judgments and decree for his own benefit, or as security for the money advanced. If he ultimately received credit from his father for said money, his in-

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Opinion of the Court.

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terest in the judgments and decree was thenceforward precisely the same as though the purchases had been originally made by his father with his own money and for his own benefit. We are unable to say therefore that the question of fact here presented was incorrectly decided.

But even if William H. Cushman is to be treated as having purchased said judgments and decree with his own money and with a view of holding them adversely to his father and Hardin, how are his rights affected by his subsequent dealings with Hardin? By his contract with Hardin under which the arbitration was had, he agreed to purchase Hardin's interest in the assets of the two firms of which William H. W. Cushman and Hardin were members, paying him therefor a price to be fixed by arbitrators. It was also agreed that in making the appraisement Hardin should be charged with his proportionate share of the liabilities of the two firms, and that William H. Cushman should assume his share of said liabilities and save him harmless therefrom. It is not disputed that the indebtedness for which the several judgments and the decree in question, except perhaps the two judgments rendered against Cushman alone, constituted a part of the liabilities of said firms, of which Hardin's proportion was to be and was in fact charged against him, and which William H. Cushman agreed to assume and protect Hardin against. Can it be doubted that charging against Hardin his proportionate share of said judgments and decree, coupled with William H. Cushman's agreements to assume Hardin's liability thereon and to keep him harmless therefrom, operated, between them, as a satisfaction and discharge of the judgments and decree? Upon what principle could William H. Cushman have been permitted afterwards to enforce said judgments or decree against Hardin? Manifestly as to him these transactions operated as a complete discharge and satisfaction, and if the judgments and decree were satisfied as to Hardin, they were equally so as to Cushman the other joint debtor.

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Opinion of the Court.

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But it is said that because William H. Cushman, during the pendency of the arbitration proceedings, and in violation of his agreement with Hardin, assigned said judgments and decree as collateral security for certain indebtedness, his assignees are entitled to hold and enforce them unaffected by the settlement with Hardin. To this view we are unable to assent. Judgments and decrees are not commercial paper, and assignees of such securities take them affected with all equities and defenses which might be set up against them in the hands of the assignor. At the time Cushman assigned these securities, his contract with Hardin was in force and was in process of execution, and Hardin had a right to satisfy and discharge them in the mode provided for in the agreement. Such right could not be divested by any act of Cushman. Hardin having performed the contract on his part, the judgments and decree became satisfied as to him, and he was thereby discharged from liability thereon, and his discharge is also available on behalf of his co-debtor.

An attempt is made to invoke as against William H. W. Cushman and his representative the doctrine of equitable estoppel. It is said that he consented to the assignment of the judgments and decree by his son, and was in fact a party to such assignment, and that he and his representative should therefore be precluded from denying the validity of said securities in the hands of the assignee. Without pausing to consider how far the doctrine of estoppel would apply if the facts were as the complainant supposes, it is sufficient to say, that as we read the record, the evidence fails to show that William H. W. Cushman was a party to the assignment, or that he was aware that it had been made. True, his name appears as guarantor upon the notes given by his son for the money borrowed from White, but it appears affirmatively that he had no personal communication with White, and we find no evidence that he had any knowledge as to what collaterals his son pledged to White as security for said notes.

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Opinion of the Court.

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On the whole case then we are of the opinion that the chancellor was justified in holding that the judgments and decree had been satisfied, and that they no longer constituted an indebtedness or claim against the estate of William H. W. Cushman, deceased.

It may further be questioned whether, upon the face of his bill, the complainant has made out a case which entitles him to relief in a court of equity. The bill is in the nature of a creditor's bill. It is brought by the complainant as the assignee of nine judgments at law and a money decree in equity, recovered by various plaintiffs, against William H. W. Cushman, in his lifetime. Of the nine judgments at law, five were recovered in the Circuit Court of the United States for the Northern District of Illinois. The other four were recovered in the Superior Court of Cook county, and upon those four judgments executions had been duly issued and returned unsatisfied in the lifetime of Cushman. The decree awarded execution, but it is not claimed that any execution was ever issued for its collection.

The judgments of the federal court, that being a court of another jurisdiction, can not be made the basis of a creditor's bill in a State court. *Steere v. Hoagland*, 39 Ill. 264. Nor will a creditor's bill, properly so called, lie for the collection of the decree, no execution having been returned unsatisfied. In this respect a money decree in equity stands upon the same footing as a judgment at law. *Weightman v. Hatch*, 17 Ill. 281; *Farnsworth v. Strasler*, 12 id. 482. The general rule, subject it is true to a very few exceptions, is, that before a bill can be filed to reach equitable assets, the creditor must first recover a judgment at law, or what in a proper case would be its equivalent, a money decree in equity, and have an execution issued and returned unsatisfied. This is a rule so well established as to require no citation of authorities. So far then as the five judgments recovered in the federal court and the decree in chancery are concerned, the complainant has no equities

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Opinion of the Court.

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superior to those of a simple contract creditor, and as to that portion of his demand his bill must necessarily fail, unless he has brought his case within some one of the recognized exceptions to the general rule.

How is it with the judgments recovered in the Superior Court? There can be no doubt that, as against Cushman, so far as those judgments are concerned, the creditor must be deemed to have exhausted his legal remedies. Had Cushman been living therefore, a creditor's bill might unquestionably have been brought against him upon those judgments, assuming of course that they had not been paid or otherwise satisfied. The bill as filed seeks to reach personal assets only, and at the time it was filed, Cushman had been dead and his administrator had been appointed more than two years, and his estate was in process of administration. No charge is made of any fraud committed by Cushman in his lifetime, and the personal assets sought to be reached are not such as had been fraudulently disposed of by Cushman, but which, if they exist at all, are within the reach of his administrator, and are assets which it was within the power and was the duty of his administrator to collect and distribute.

Can it be said, as the case now stands, that the complainant has exhausted his legal remedies? Remedies which might have been pursued in the lifetime of Cushman were extinguished by his death, and a new class of legal rights and remedies was created. His personal estate is no longer liable to be seized upon execution, but creditors are given the right, upon exhibiting and establishing their claims in the county court, to share in the distribution of his personal estate.

Not only is it true that when a debtor dies, the law gives new legal remedies against his representatives, but the rule is imperative that, to entitle a creditor to share in the distribution of his estate, those remedies must be pursued. A creditor of a deceased person must exhibit and prove his claim in the county court before he can be entitled to payment. *Reitzell v.*

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Opinion of the Court.

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*Miller*, 25 Ill. 67. And in this respect, judgment creditors, except so far as their judgments are liens on real estate, and simple contract creditors, stand upon the same footing. *Paschall v. Hailman*, 4 Gilm. 285; *Turney v. Gates*, 12 Ill. 141; *Clingman v. Hopkie*, 78 id. 152. It is difficult then to see how the mere fact that a creditor has exhausted his legal remedies against his debtor while living, can furnish a sufficient ground for proceeding by creditor's bill to reach personal estate while the administration is in progress, especially where no fraud is charged against the intestate, and the only scope of the bill is, to seek a remedy against the fraud or failure of duty of the administrator himself, and to reach property which the administrator is entitled to but which he has failed to get into his possession.

In *Harris v. Douglas*, 64 Ill. 466, this court said: "A court of equity will not assume jurisdiction, except in extraordinary cases where the remedy afforded by the statute is inadequate. It is for the very plain reason that the statute had pointed out a different mode, and the party must pursue the remedy provided by law. By the provisions of the Statute of Wills, claims against the estate are to be classified, and some are to be paid in full and others *pro rata*. A claimant can not avoid this statute by resorting to equity. The law is settled, in this State at least, that a court of equity will not ordinarily assume jurisdiction until the claimant shall have exhibited his claim and had it allowed in the county court, and then, if any special reasons, that may be deemed sufficient, can be assigned, why that court can not afford the requisite relief, equity will assist him, but not otherwise." The doctrine here stated was reaffirmed in *Blanchard v. Williamson*, 70 Ill. 647.

The bill alleges that the complainant, within two years after letters of administration were issued, exhibited in the county court of La Salle county his claim against the estate of Cushman upon all of said judgments and upon said decree, and caused proceedings to be commenced in said court for its al-

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Opinion of the Court.

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lowance, but there is no averment that it was proved up and allowed, and the evidence shows that said proceedings, after remaining pending and undetermined for about five years, were dismissed by the county court on its own motion for want of prosecution.

The complainant's position seems to be, that his bill makes a case within one of the recognized exceptions to the rule requiring an exhaustion of his legal remedies before resorting to a court of equity for relief. The exception relied upon is plainly the one under which courts of equity will, in extraordinary cases, take upon themselves the administration of estates. The bill purports to be filed on behalf of the complainant and on behalf of such others of the creditors of Cushman as might choose to come in and bear their proportionate share of the expenses of the litigation. After alleging the recovery of said judgments and decree, the issuing and return of executions so far as executions were issued, the proceedings by which said judgments and decree were assigned to and became the property of the complainant, the death of Cushman and the appointment of his administrator, the bill alleges, in substance, that Cushman left large equitable interests and concealed assets which the administrator made no effort to reduce to possession; that the administrator and heirs were colluding together with divers other persons to defraud the creditors of the estate out of their just demands; that Cushman at his death left large assets in the hands of surviving partners, which they were wilfully and fraudulently seeking to convert to their own use, claiming that nothing was due therefrom to the estate of Cushman, and that they had disposed of a large amount of said assets, realizing a large profit therefrom. The bill prays for answers under oath, and a discovery of all property, interests and effects of said Cushman, or of which he was possessed or in which he was in any way interested at the time of his death, and not already disposed of by his administrator in due course of administration; and

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Opinion of the Court.

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for the appointment of a receiver to receive all of said assets, and manage and dispose of the same as the court should direct, and apply the proceeds to the payment of the complainant's claim, and the claims of such other creditors of said estate as should be entitled to a participation therein.

The evident purpose and scope of the bill is, to induce the court in which it was filed to take upon itself the administration of the estate of Cushman, so far as it had not already been administered upon, and thus supersede the jurisdiction of the county court. The court is asked to take possession of the remaining assets of the intestate through the instrumentality of a receiver, and distribute the same or the proceeds thereof to those entitled thereto. This is of the very essence of the administration of an intestate estate. If it be said that the real purpose of the bill is to draw to the court of chancery the administration of the estate only as to certain specified assets, viz., the interest of the intestate in the assets of the partnership of which he was a member, the answer is, that when a court of equity takes upon itself the administration of an estate at all, it will take the whole administration into its hands. *Freeland v. Dazey*, 25 Ill. 294.

A court of chancery may, in the exercise of its general jurisdiction, take upon itself the administration of an estate, but it has been frequently held that it will not do so except in extraordinary cases. (*Freeland v. Dazey, supra*; *Heustis v. Johnson*, 84 Ill. 61; *Cowdrey v. Hitchcock*, 103 id. 262; *Harris v. Douglas, supra*.) Is such a case made out by the bill? The allegation is merely that the conduct of the administrator had been negligent and fraudulent, but no reason is assigned why the ordinary powers of the county court are not adequate to the protection of all the complainant's rights. It is not shown that the interposition of that court has been asked for, or that the alleged misconduct of its administrator has been in any way brought to its attention. The county court has ample power to compel an administrator to proceed properly and

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Opinion of the Court.

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faithfully in the discharge of his duties. If he has made mistakes it has power to correct them. If he has been guilty of fraud, or has wasted the estate, or has shown himself incompetent, or an improper person to conduct the administration, the court has power to call him to account, or to remove him and appoint another and suitable person in his place. If the administrator in this case has failed or refused, either negligently or fraudulently, to call Cushman's surviving partners to an account, or has made a collusive settlement with them, the court has ample power to apply the proper remedy. It does not appear, however, that such power has been in any way invoked.

In *Freeland v. Dazey*, the misconduct charged upon the administrator was, the neglect to file an inventory whereby the estate had been wasted, and neglecting and refusing to settle the estate. The court, in holding that chancery should not take jurisdiction in such case, adopted as a test, the fact that it did not appear that the ordinary powers of the probate court were inadequate to the protection of all the complainant's rights. In *Heustis v. Johnson*, the bill charged that the executor had failed to discharge his duties promptly, and had by divers plausible devices, excused himself from properly accounting, when he ought long before to have made a final settlement of the estate. It was held that there was no jurisdiction for the reason that the county court had full power to grant relief in the case made by the bill. In *Harris v. Douglas*, it was held, in the language already quoted, that a court of equity will take jurisdiction only where "special reasons, that may be deemed sufficient, can be assigned, why that court (the county court) can not afford the requisite relief."

We are also of the opinion that the complainant effectually released his right to have his judgments and decree satisfied out of the personal assets of the Cushman estate, by the instrument dated August 31, 1886, executed by the complainant, Isaac N. Hardin and Gertrude H. Hardin, to the widow and

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Opinion of the Court.

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surviving children of said Cushman. That instrument recited a consideration of \$3500, and was executed under the hands and seals of the parties of the first part. By it said parties of the first part agreed, that any and all claims filed by them or either of them in the county court of La Salle county against the estate of Cushman should be withdrawn and dismissed, and all proceedings for the collection thereof in that court abandoned; that no obstacles whatever should be interposed by said parties or either of them to the final settlement of said estate in said court, and that said estate might be fully and finally settled, as in due course of administration, wholly discharged of any claim, in law or equity, by said parties or either of them, against the same, and they thereby released and relinquished to said widow and surviving children of Cushman any claims they or either of them had or might have to share in the general distribution of said estate. And said parties further stipulated that a final settlement by the administrator of said estate, and the distribution of the assets thereof by said court, might be had and made, discharged of any and all claims whatsoever of said parties or either of them, in law or equity, to any part or portion thereof. It is true, a reservation was made or attempted to be made by the complainant and the Hardins, of the right, by any proceedings then pending or thereafter to be instituted, to enforce the collection of any judgment or decree or other valid claim they or either of them may have had against Cushman in his lifetime, or against his legal representatives, by subjecting to the payment thereof any interest which Cushman in his lifetime had or his legal representatives then had, in any causes of action or dealings between Cushman and the firms of which he had been a member, or the railroad companies with the building of whose roads said firms had been specially connected, or any claims or causes of action which may have existed in favor of Cushman against Plumb, Shumway and Hinckley or either of them.

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Opinion of the Court.

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The remedy by which the creditors of an intestate may subject the personal estate of their deceased debtor to the payment of their claims, is by due course of administration. As to all personal assets which are legally within the reach of the administrator, and upon which the creditor has obtained no lien during the lifetime of his debtor, this remedy is exclusive. The rule may be otherwise in case of assets fraudulently disposed of by the intestate in his lifetime. All personal assets as to which the intestate was himself in a position to assert title at the time of his decease, pass to the administrator, and it is through him alone that creditors must seek to have them subjected to the payment of their debts. It follows then that a covenant by a creditor, that all proceedings for the collection of his debt through the instrumentality of the administration shall be abandoned; that the estate may be finally settled, and final distribution made wholly discharged of his claim, and releasing and relinquishing to the widow and heirs of the intestate any claim he might have to share in such distribution, is in effect a complete abandonment and release of all legal claim to have his debt satisfied out of any personal estate which the administrator has reduced to possession, or to which he was entitled as administrator.

The complainant does not seek by his bill to reach any property not assets of the estate of Cushman. The existence of no property is alleged which the administrator could not and ought not to have taken into his possession. If it be true, as the bill charges, that he failed to discharge his duty, either through negligence or fraud, the nature of the assets which the bill seeks to reach is in no way changed. Ample power to compel their collection and distribution resided in the county court, and that is the tribunal to which the law had committed the jurisdiction in matters of administration. The complainant then by renouncing and abandoning his right to reach said assets through process of administration, must be held to have

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Opinion of the Court.

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abandoned the only remedy the law gave him, and to have placed said property wholly beyond the reach of his claim.

Nor can it avail him that a reservation was made by the same instrument of the right, by other proceedings, then pending or thereafter to be instituted, to enforce the collection out of Cushman's interest in the assets of the firms of which he was a member at the time of his death. That interest could be reached by him by due course of administration and not otherwise, and the reservation was therefore nugatory.

Nor can it be seen that the complainant obtained any rights by virtue of the instrument executed to him by the widow and children of Cushman of the same date with the instrument last above mentioned. By that instrument said widow and children transferred and set over to the complainant all their claims and causes of action growing out of the business and dealings between Cushman and the several firms with which he had been connected, and also their right to a further accounting with the members of said firms, for moneys or securities belonging to Cushman. The fact being that all rights and causes of action growing out of Cushman's dealings with said firms, and the right to an accounting with the surviving members of said firms, were vested in the administrator and not in the widow and children of Cushman, there were no rights or interests of that character which said widow and heirs could assign to the complainant. That they have an assignable interest in their distributive share of the assets of the estate after the payment of debts need not be questioned, but that was an interest wholly distinct from an interest in specific chattels upon which no administration had been had. As to the latter they had no interest susceptible of assignment, the entire ownership, for all the purposes of administration, being vested in the administrator.

But even if this were otherwise, it can scarcely be questioned that the widow and children of Cushman had lost, by their laches, all right to demand a further accounting from Cus-

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Opinion of the Court.

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man's surviving partners, at the time they undertook to assign such right to the complainant. The evidence shows that an accounting and settlement were had between the administrator and said surviving partners, which were approved by the county court of LaSalle county by a formal order entered in that court May 21, 1881, and that upon a bill filed in the circuit court of said county, based upon such accounting and settlement, a decree was entered June 21, 1881, formally declaring a final settlement of said partnerships and discharging said partners from all liability to the estate of Cushman. This order and decree remained unchallenged, in any form, by either the widow and children of Cushman or any one else, up to the time said widow and children attempted to transfer their right to such accounting, although something over five years had elapsed. No explanation of this delay is attempted, nor does the complainant attempt to explain his own delay for nearly one year after said assignment to him, to attack or call in question the order and decree of the county and circuit courts of La Salle county, or the accounting and settlement upon which they were based. After an unexplained delay covering a period of nearly six years in all, during which one of the surviving partners has died, the situation of the others has materially changed, and more or less of the evidence by which the true state of the accounts of said firms could be established has disappeared, it should be held, we think, that the widow and children of Cushman, and their assignee, should be barred by their laches of their right to attack said accounting and settlement as fraudulent.

The demurrer to the supplemental bill was properly sustained. That bill was filed for the purpose of setting up the interest obtained by the complainant, through the assignment to him from Mrs. Cushman and her daughters, in the assets of the firms of which Cushman was a member. As no interest capable of being asserted either at law or in equity passed to him by the assignment, he had no newly acquired interest

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Opinion of the Court.

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which could be made the basis of a supplemental bill. Said bill also attacks the accounting and settlement of 1881, on the ground of fraud, but in no way attempts to excuse or account for the delay of nearly six years, during which the order and decree founded on said settlement and judicially confirming the same had in no way been called in question.

The cross-bill filed by Mrs. Cushman and her daughter, was properly dismissed. That bill was filed October 24, 1887, and attacked the settlement of 1881 on the same ground set up in Winslow's supplemental bill. No attempt was made to excuse laches, and for that reason the bill was insufficient. But by an instrument executed by the complainants in the cross-bill to Plumb and the administrators of Shumway, dated December 2, 1881, said complainants, for a valuable consideration, assigned to Plumb and said administrators, all their interest in the personal estate of Cushman, deceased, and appointed Plumb and the administrators of Shumway their attorneys, irrevocably, to collect and receive their distributive share of said personal estate, and in their names to execute to the administrator of Cushman a release of all his liability to them. Under this power Plumb and the administrators of Shumway executed such release, and the assignment, the warrant of attorney, and the release executed thereunder, being set up by plea to the cross-bill, the plea was held sufficient, and no further attempt was made by the complainants in the cross-bill to litigate the matters thus presented.

We are unable to see that any error was committed by the order of the court dismissing the cross-bill of Nellie Driver. The complainant in that bill was the administratrix of a deceased son of Cushman, and said bill was filed April 27, 1887, and seeks to set aside the settlement of 1881, and the order and decree of the courts of La Salle county confirming the same, alleging the same grounds for such relief as were set up in Winslow's supplemental bill. Here, as in the other bills, no attempt is made to excuse laches, although said order and

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Syllabus.

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decree had been in full force and unquestioned for about six years. The time within which the decree could have been reviewed on error had long since elapsed. It was incumbent upon all parties bound by the decree, if they desired to attack it on the ground of fraud, to do so in apt time, and a delay of nearly six years, unexplained, must manifestly be held to be sufficient to bar relief.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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175	569
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THE CHICAGO, SANTA FE AND CALIFORNIA RAILWAY COMPANY

v.

HUGH WARD.

*Filed at Ottawa November 15, 1888—Re-filed May 16, 1889.*

1. EMINENT DOMAIN—*waiver of trial by jury—as to preliminary facts.* Where the petitioner, in a proceeding to condemn land for railroad purposes, makes no objection below to the action of the court in hearing evidence in reference to the title and rights of the defendant in the premises sought to be taken, and finding those rights without a jury, but participates in such hearing and offers evidence, it will be estopped from making the objection in this court that the preliminary facts were not found by a jury. In a civil case it is always competent for the parties to waive a jury and submit their case, or any part of it, to the court for decision.

2. SAME—*general exception—to what it relates.* On petition to condemn, before the case was submitted to the jury, the record showed that the parties appeared, and each introduced preliminary proof to the court as to the extent of the defendant's interest and right, without objection or protest, and made suggestions to the court, and that the court found such right and interest of the defendant in the premises, after which the record recited, "to which ruling and order of the court the petitioner now here excepts." Held, that the exception had reference to the conclusion reached by the court after hearing the preliminary proofs, and not to the fact that the court heard and passed upon such proofs without a jury.

3. SAME—*measure of damages—rights appurtenant as an element.* On a proceeding to condemn the south half of a lot, to which was annexed,

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Syllabus.

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as appurtenances, a right of way over the other half of the lot, a coal office and scales also upon such other half, and a side-track in an adjacent alley, such appurtenances are property interests connected with the land sought, and there is no error in instructing the jury to take such rights, privileges and appurtenances into consideration in determining the fair market or cash value of the south half of the lot, as they are proper elements of value to the property to which they belong.

4. Where a lot sought to be taken for a public use is used for a coal yard, in connection with its appurtenances, which are, a right of way over an adjoining lot to a public street, a right to the use of a coal office and a pair of scales on the latter lot, and of a side-track from a railroad, and the lot sought is of but little value without such rights and privileges in the other lot, the jury, in estimating the compensation to the lot sought, should consider its value in connection with its appurtenances.

5. A acquired title to the south half of a lot, to which was appurtenant a right of way over the north half, and a coal office and scales on the north half of the lot, and also a switch-track along the lot. A railway company, by deed, acquired the title to the north half of the lot, and sought to condemn the south half of such lot. A, the owner thereof, by cross-petition, claimed damages for the value of his lot as enhanced by these appurtenances, or for the value of the appurtenances. The railway company never offered to allow A to remove the coal office and scales from the north half of the lot, and there was no evidence tending to prove that the property had any value to A if left remaining thereon, or that their removal was practicable, but on the contrary, the court included the coal office and scales in its judgment of condemnation: *Held*, that A, under the facts, was entitled to recover, as compensation, the value of such property as it stood at the time.

6. *SAME—measure of damages—elements to be considered, generally.* In a proceeding to condemn land for public use, the owner is entitled to just compensation for any property taken or injured. Such compensation is to be estimated according to the existing condition of the property at the time. He is not required to remove buildings or other things attached to the realty, in order to lessen his damages.

7. APPURTENANCE—*what so regarded—right of way, coal office—weighing scales—railroad side-track.* The owner of a lot conveyed the north half thereof, reciting in the deed that he "expressly reserves from this conveyance the right of way over and across the north half of said lot to the south half thereof, and back again, for teams and men," and afterward conveyed the south half, "with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining:" *Held*, that the right of way over the north half of the lot was appurtenant to the south half, and passed under the conveyance of the latter.

8. The owner of a lot, the north end fronting on a public street, conveyed by deed the north half of the lot to A, reserving therein a right

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Brief for the Appellant.

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of way over the same to the south half, and also a coal office located on the north end of the lot. The grantor, and A, the grantee, then made an agreement, which was recorded, in which it was recited that A had bought an undivided half of certain scales situated on the north half of the lot, near the coal office, and that a railway company was about to build a side-track along the west side of the lot for the convenience of business on said lot, and it was thereby agreed that each should own, pay for and keep in repair the undivided one-half of the said scales and side-track, and that the scales should be owned and used jointly. A conveyed the north half with the same reservations, and by mesne conveyances the title was vested in B, who conveyed to a railway company. While the original owner was in the use and enjoyment of the right of way reserved, he conveyed the south half to C and D, with the appurtenances, and they conveyed to W., all of which deeds were recorded. The agreement in respect to the scales and side-track was assigned by A to his grantee, and passed, by successive assignments, to the subsequent owners of the south half, which assignments were recorded. By the deeds from the original owner and his grantees, the undivided half of the scales was also conveyed to W., and the proof showed that W. and his grantees had used the coal office, right of way and side-track for over twenty years, in connection with the coal business on said lot: *Held*, on a proceeding to condemn the south half of the lot, that the right of way over the north half of the lot, the coal office, and the undivided half of the scales and side-track, were to be regarded as appurtenances to the south half of the lot.

APPEAL from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

Messrs. HALEY & O'DONNELL, and Messrs. WILLIAMS & THOMPSON, for the appellant:

The finding of facts by the court was contrary to the evidence, and the court had no power to pass upon issues of fact, but should have submitted them to the jury.

If the coal office on the north half of the lot was personal property, it could not be appurtenant to the other half of the lot. *Bliss v. Kennedy*, 43 Ill. 67; *Scheidt v. Belz*, 4 Bradw. 431.

By instructions Nos. 1 and 2, the court took the facts from the jury, and by the last, directed the jury not only to find the damages and just compensation for the property sought and taken, but actually compelled the petitioner to pay for prop-

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Brief for the Appellee.

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erty situated upon land not embraced in the petition, the same as if it took it. Rev. Stat. chap. 47, secs. 1, 8; *Dupuis v. Railway Co.* 115 Ill. 97; *McCormick v. Park Comrs.* 118 id. 655; *Sherman v. Dutch*, 16 id. 283; *Dart v. Horn*, 20 id. 212; *Chicago v. Birby*, 84 id. 82; *Village of Warren v. Wright*, 3 Bradw. 602.

Mr. BENJAMIN OLIN, and Mr. J. S. REYNOLDS, for the appellee:

It was proper to bring to the attention of the court, by cross-petition, any interest or claim not stated, or not accurately stated, in the original petition. (*Johnson v. Railway Co.* 111 Ill. 413; *Johnson v. Railway Co.* 116 id. 521.) But as there was no demurrer or objection to the cross-petition in the case at bar, there is no question presented thereon. Appellant's counsel, in their brief, do not refer to the subject.

The court, in condemnation proceedings, is to pass upon preliminary questions before submitting the question of damages or compensation to the jury. *Smith v. Railroad Co.* 105 Ill. 518.

The jury, under the statutory oath, are not to pass upon any questions except such as affect the matter of damages or compensation. They have to do alone with values. *Smith v. Railroad Co.* 105 Ill. 518.

The submission to the jury of matters of title, and of the question whether lands sought to be condemned are entitled or not to certain easements appurtenant, etc., would create confusion and embarrassment. Such inquiries for the jury are not contemplated in the statutory oath, nor in their report, under the statute.

Again, as both sides voluntarily submitted the questions involved in the preliminary findings, to the court, together with the proofs thereon, and as neither side made any objection, of record or otherwise, to the court passing thereon without the intervention of a jury, this question as to the propriety of the court hearing and determining such preliminary mat-

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Opinion of the Court.

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ters can not be raised here. It would be a fraud to raise it in this court now, if thereby it would prejudice the rights of the appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is a proceeding for condemnation, begun by the appellant company by the filing of its petition in vacation on March 30, 1888, in the Circuit Court of Will County, making the appellee and many other persons defendants, and seeking to condemn a large number of separate pieces of real estate. Among these pieces the petition describes the south half of lot four of H. A. Gardner's subdivision, etc., in Joliet, Will county, and alleges, that the appellee, Hugh Ward, is the owner thereof. Ward moved for a separate trial, and, after leave granted, filed a cross-petition.

His cross-petition avers that he is the owner of the S.  $\frac{1}{2}$  of said lot 4, and that he also owns a valuable interest in the north half of said lot; that he also owns the privileges, appurtenances and rights of way hereinafter mentioned; that for more than fifteen years he has been engaged in the coal business on lot 4; that said business is and has been very valuable and profitable; that lot 4 has a special value as a business location for a coal dealer; that his property in and appurtenant to lot 4 and sought to be condemned is of the value of \$4500.00; that the damage to his business will exceed \$1500.00, etc.

On motion, the court directed that the several pieces of property should be divided into four groups, and that a separate jury should be empanelled to try the questions to be submitted to a jury in connection with each group. By an order entered without objection, the Circuit judge directed, that the south half of lot 4, and certain other property of other defendants, should be assigned to the fourth group, and that the questions in relation thereto should be submitted for trial to the fourth jury.

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Opinion of the Court.

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Before the juries were empanelled, the court below heard preliminary proof as to title, and entered preliminary orders finding that certain defendants were owners of certain pieces of property. On June 6, 1888, a preliminary order or decree was entered in reference to the south half of lot 4 belonging to appellee, and being the only property involved in this appeal. By the terms of this preliminary order, it was found, that Ward was the owner of the S.  $\frac{1}{2}$  of lot 4 subject to a right of way over the same "which is appurtenant to the north half of said lot and held and enjoyed by the owner thereof;" that Ward owns and enjoys, as appurtenant to said south half, 1st—a right of way over and across the north half of lot 4 to the south half thereof and back again for teams and men, 2d—a coal office on the north half of the lot used in connection with his business on the south half, 3d—an undivided one half of a Fairbanks scales located on said north half and on Fourth Avenue immediately north of said lot, 4th—an undivided one half of a switch-track in an alley 18 feet wide on the west side of said lot 4, which switch-track, connecting at the south with the C. and A. R. R. track and running close to the west line of lot 4 northward and across and north of Fourth Avenue, was formerly built and paid for, one half by the then owner of the south half of the lot and one half by the then owner of the north half thereof, for the convenience of business upon the lot, and under an agreement duly recorded in Will county between the said owners, that the said scales and side track should be used jointly; that the undivided one half of said scales and switch-track have been conveyed with the south half of the lot and as appurtenant thereto in all subsequent conveyances, and the switch-track has been kept in repair jointly by the said owners; that the rights above specified, with the said alley 18 feet wide and another alley 14 feet wide on the south end of lot 4, used by Ward in connection with the south half thereof, have all been enjoyed and used by Ward,

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Opinion of the Court.

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and his grantors of said south half, in their business, carried on on said south half, for more than twenty years, etc.

Afterwards on June 11, 1888, the case was submitted to the jury who returned a verdict of \$2500.00, to be paid by the petitioner to the owner of the south half of lot 4 (subject to the right of way over the same appurtenant to the north half), with the rights, privileges and appurtenances aforesaid, as the just compensation for taking the same. From the judgment rendered upon this verdict the present appeal is prosecuted.

The first error assigned by appellant has relation to the preliminary order entered by the trial court. It is claimed, that the court has no power, in a condemnation proceeding, to enter a decree, determining the title of the defendant or cross-petitioner to the property to be condemned, before submitting to the jury the question of the compensation to be paid for taking the property. It is especially insisted, that, in this case, it was for the jury to determine whether or not the easements and other rights and privileges, claimed to have been appurtenant to the south half of the lot, were actually owned by appellee and used by him in connection with his business, and that the decision of these matters by the court was an invasion of the province of the jury and a withdrawal from them of questions of fact, which should have been submitted to their consideration. We do not deem it necessary to pass upon the point thus made for the reason that appellant is estopped from making it in this court by its failure to insist upon it in the court below. It is always allowable for the parties in a civil action to waive a jury and submit their case or any part of it to the court for decision.

In the course of the proceedings below, appellant made no objection to the submission of these preliminary matters to the court, but, on the contrary, united with the appellee in a trial of them before the judge without a jury. We find the following entry in the record: "And now again comes said petitioner by its attorneys, and the said parties, interested in

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Opinion of the Court.

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the property, which, by a former order entered herein, is to be submitted to the fourth jury herein to be called, also come, and the court sits and hears *the preliminary proofs offered by said several parties.*" This entry appears under date of May 29, 1888, and no objection was made nor exception taken by appellant.

After appellee had introduced his preliminary proof to the court, without objection, on the part of appellant, that the court was hearing such proof without a jury, the record then recites, under date of June 2, 1888, that "the petitioner then offered in evidence, as preliminary proof in its behalf to the court, a deed from H. S. Carpenter to C. S. F. and C. R'wy Co." etc., and that "thereupon the petitioner, in its preliminary proof to the court, called H. S. Carpenter, who testified," etc.

It is true, that, at the close of that part of the decree of June 6, 1888, which has reference to the south half of lot 4, appears the following: "to which ruling and order of the court the petitioner now here excepts." But this exception has reference to the conclusions reached by the court after hearing the preliminary proofs, and not to the fact that the court heard and passed upon such proofs without a jury. The record shows, that appellant as well as appellee introduced preliminary proofs without objection or protest, and that, upon such introduction, suggestions were made by appellant's counsel as well as by counsel for the cross-petitioner.

It is next objected by appellant, that the decree of June 6, 1888, erroneously found appellee to be the owner of the appurtenances therein named. We think the evidence sustains the findings of the decree.

First, as to the right of way over the north half of the lot. Jacob Powles, the original owner of lot 4, by deed dated June 24, 1867, and recorded November 26, 1868, conveyed the north half of the lot to Cagwin, reciting in the deed that he "expressly reserves from this conveyance the right of way over and across the north half of said lot to the south half thereof and back

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Opinion of the Court.

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again for teams and men." The same reservation is contained in all the successive conveyances of the north half from Cagwin down to Carpenter, the grantor of appellant, all of which conveyances were duly recorded. While Jacob Powles was in the use and enjoyment of the right of way thus reserved, he conveyed the south half of the lot by warrantee deed, dated February 20, 1869, to Daniel Powles and Barbaker; the two latter, by warrantee deeds dated February 22, 1870, and November 29, 1871, conveyed the south half to appellee Ward, and were using the right of way at these dates. The three latter deeds were duly recorded. They convey the south half of the lot "with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining." This right of way was an appurtenance to the south half at the time of these conveyances, and passed to appellee with the land. "Some things will pass by the conveyance of land as incidents appendant or appurtenant thereto. This is the case with the right of way or other easement appurtenant to land." (*Morrison v. King*, 62 Ill. 30.)

Second, as to the undivided half of the scales and the switch-track. June 24, 1867, Jacob Powles, owning the south half of the lot, and Cagwin, owning the north half thereof, made an agreement, which was afterwards recorded, in which it was recited that Cagwin had bought an undivided half of the scales, and that the C. A. and St. L. R. R. Co. was about to build a side track along the west side of the lot, connecting with the main track of the road by means of a switch for the convenience of business on said lot, and it was thereby agreed that each should own, pay for and keep in repair the undivided half of said scales and side track, and that the side track should be laid and maintained along the west side of the lot, and that the scales should be owned and used jointly. This agreement was assigned by Cagwin to his grantees of the north half, and passed by successive assignments, endorsed on the contract and recorded, to the subsequent owners of the north half. The

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Opinion of the Court.

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deed from Jacob Powles to Barbaker and Daniel Powles, and the deeds from the latter to Ward, convey the south half of the lot, "together with an undivided one half of a Fairbanks scales, now located and in use on the north half of said lot 4, and also the interest of party of first part in and to a switch track skirting the west side of said lot, laid down \* \* \* for the convenience of business on said lot."

Third, as to the coal office. The language of the preliminary order or decree is: "that said Hugh Ward also owns and enjoys, as appurtenant to the south half of lot 4, and uses in connection with his business carried on thereon a coal office on the north half of said lot." The original deed of June 24, 1867, contains this language: "and saving and reserving also the coal office now located on said north half." The testimony shows, that appellee owned the coal office, and that he and his grantors used it for more than twenty years in connection with the business carried on on the south half of the lot.

In addition to the documentary evidence, the oral proof shows, that, for more than twenty years, appellee and his grantors had made use of the right of way, and the side track or switch track, and the scales and coal office in connection with the coal business conducted on the south half of the lot. Fourth Avenue ran along the north side of lot 4. The office was on the north-east corner of the north half of the lot fronting on Fourth Avenue. Wagons and teams, used in the coal business, passed from the south half across the north half west of the coal office, along the reserved right of way, to the scales connected with the coal office. Ward and his grantors kept the switch-track in repair and used it jointly with the owners of the north half for purposes connected with the business. There is some evidence tending to show, that Ward's teams sometimes went, during the last three years, from the south half of the lot across lot 3 to the east of lot 4 in order to reach the scales and office, but there was no abandonment of the right of way across the north half, which was also used.

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Opinion of the Court.

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The next error assigned by appellant has reference to the instructions given to the jury in behalf of appellee. Two of these instructions are said to be erroneous because they tell the jury, that the rights and privileges above mentioned are appurtenant to the south half of the lot and are property interests connected therewith, and because they direct the jury to take such rights, privileges and appurtenances into consideration in determining, under the evidence, the fair market or cash value of the south half of the lot. We see no error in the instructions in this regard.

Suppose that a man owns a farm surrounded entirely by farms belonging to other parties, so that he has no access to it except by passing over land owned by some one of his neighbors. A farm thus situated without means of ingress and egress might be almost valueless. But if its owner at the same time owned a right of way across a portion of the adjoining territory, so that he could go to and from his farm at will, the latter would have a greatly increased value. Why is it not proper to consider the farm as having such a right of way incident to it in fixing its value?

So, in the case at bar, the south half of lot 4 is so located that it is fit only for a coal yard or some similar use. But its fitness even for this purpose depends on there being an office on a public street, a wagon road for men and teams to Fourth Avenue over the north half of the lot, a pair of weighing scales in connection with the street and office, a railroad switch or sidetrack for shipping in coal on the west side of the lot. By itself the south half of the lot has little value; with the privileges thus designated it does have a very considerable value to its owner for the uses, to which he applied it. These privileges do not constitute other and outside property interests not a part of the land taken by appellant. They are appurtenant to the land taken and go with it.

The instructions do not compel appellant to pay for the coal office itself. They merely designate the right to use so much

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Additional opinion of the Court.

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of the north half of the lot, as is occupied by the coal office, for the purposes of such an office in connection with the business carried on on the south half. Such right, as well as the privilege of using the scales and switch and right of way, made the south half valuable to appellee as a coal yard. When appellant takes the ground embraced within the limits of the south half of the lot, it also takes or destroys these appurtenances.

It is complained that the instructions take from the jury certain questions of fact. But the questions of fact referred to are only those, which concern the matter of title and the matter of interest in the appurtenances above mentioned. As these questions were settled by the court in its preliminary order entered after a hearing without a jury by consent of both parties, it was not error to assume the existence of the appurtenances in the instructions to the jury. The jury were merely to take into consideration the appurtenances, whose existence had already been decided upon by the court, in determining the value of the land.

We perceive no such error in the record as will justify a reversal.

The judgment of the Circuit Court is, therefore, affirmed.  
*Judgment affirmed.*

Subsequently, on May 16, 1889, upon rehearing, the following additional opinion was filed:

Mr. JUSTICE WILKIN: On examination of the petition for a rehearing in this case, we were led to believe that the error assigned on instructions given at the request of appellee, was entitled to further consideration, and to that end granted the rehearing.

The only ground upon which a reversal of the judgment below is now urged is, that the trial court erroneously included in its order of June 6, 1888, "a coal office, an undivided one-half of platform scales, and an undivided one-half of a switch-

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Additional opinion of the Court.

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track," as *appurtenant* to the south-half of lot 4, the first two being located on the north half of said lot, and the switch-track on an alley west of and adjacent to said lot 4, and ordering that in estimating the compensation to be paid appellee, they should be considered as a part of said south half. Also, that the same error was carried into instructions given on behalf of appellee, the effect being to charge appellant with the value of the pieces of property so designated, thus, as is said, adopting an improper measure of damages, to the prejudice of appellant.

We are not able to perceive, from the manner in which the trial was conducted before the jury, how the preliminary order of the court could have influenced their verdict. We are of opinion, however, that the instructions were calculated to lead the jury to understand that the value of said property was a proper element of damages to be considered by them in making their verdict. This, under other facts and circumstances, would doubtless work a reversal of the judgment below, but we do not think such should be the result in this case. In other words, we think, under all the evidence, appellee was justly entitled to recover of appellant the value of the property, and whether that was accomplished by the misuse of the term "appurtenances," or otherwise, is a matter of no importance to appellant. We have already decided that the coal office, scales and switch-track, though not located on appellee's land, were his property. That appellant has taken them, can not, in the light of this evidence, be denied. Then, why should it not pay for them?

The record shows that it had obtained a deed to the north half of lot 4 prior to filing its petition, though it was not recorded until afterward. On page 48 of the record we find this recital: "Hearing of further preliminary proof on the part of the petitioner, touching the property of Hugh Ward." And on page 49 the finding of the court, as follows: "And the court doth further find and adjudge, that by deed from

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Additional opinion of the Court.

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Henry S. Carpenter and wife, of date March 16, 1888, and recorded in the recorder's office of Will county, Illinois, on June 9, 1888, the petitioner herein *became the owner of the appurtenances* to the north half of said lot 4, *in said former order herein stated or referred to*, and that the petitioner has contracted with said Carpenter to disconnect and remove the switch-track from the north half of said lot 4." This further order was made at the instance of petitioner, and no objection or exception thereto appears to have been made. Appellee, by his cross-petition, had set up his ownership to this property. There is nothing whatever in the record to show that appellant at any time offered to allow appellee to remove it from said north half, nor that he was offered a reasonable opportunity so to do; nor is there any evidence tending to prove that the property had any value to appellee if left remaining thereon, or that its removal was even practicable, even if he had been allowed to remove it.

When it is sought to condemn private property for public use, the owner is entitled to just compensation for any property taken or injured, such compensation to be estimated according to the existing condition of the property at the time. He is not required to remove buildings or other things attached to the realty in order to lessen his damages, nor has he a right to do so without the consent of the petitioner. True, this property was not on the south half of lot 4, but appellee's rights thereto being set up, appellant could not, after acquiring the title to the north half, take it without making compensation therefor. Moreover, in this case, the verdict of the jury and the judgment below give appellant the property, and the judgment expressly provides, "that appellant, upon payment to appellee of the amount found by the jury, shall take possession of and hereafter hold for railroad purposes," not only the south half of lot 4, but "a coal office on the north half of said lot, and one undivided half interest in one Fairbanks' scales, now located on the north half of said lot, \* \* \* and the undi-

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Syllabus.

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vided half interest of said Hugh Ward in and to a switch-track on the west of said lot, all as appurtenant to said south half," etc. Thus the error in the preliminary order and instructions complained of, is carried into the final judgment, giving appellant all that it is required to pay for.

The witnesses on behalf of appellant and those on behalf of appellee differ very widely in their estimate of damages. There was no proof as to the value of the property in question. Neither party seems to have given any attention to that subject on the trial, and no witness on either side includes the value of the coal house, switch and scales in his estimate, and it may well be doubted whether or not such value entered into the estimate made by the jury. Certain it is that in no view of the case can it be said that the verdict was increased by the instructions complained of, beyond the naked value of such property, which being in possession of appellant, and the title thereto vested in it by the order and judgment of the court below, it must pay for.

*Judgment affirmed.*

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ESTHER F. WILKINSON *et al.*

v.

ABRAHAM R. THOMAS *et al.*

*Filed at Ottawa May 16, 1889.*

1. ADVANCEMENT—*can not rest in parol*—since the act of 1872. An advancement of a parent, in his lifetime, to his child, can not, since the act of 1872, relating to the descent of property, be shown by the parol declarations of the parent or the parol admissions of the child, that he or she had received his or her share.

2. Under this statute, an advancement can not be created by parol declarations or statements. On the other hand, in order to create a valid advancement, the gift or grant must be expressed in writing as an advancement, or charged in writing by the intestate, or acknowledged in writing by the child or other descendant.

128	363
36a	80
128	363
68a	72
128	363
170	199
128	363
187	*577
128	363
201	*18
128	363
204	1434

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Brief for the Appellants.

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3. In 1869, a father, for the expressed consideration of love and affection and one dollar, conveyed a lot of ground to his daughter, of the value of \$1000. In 1876 he conveyed to each of two of his sons eighty acres of land in Iowa, for the expressed consideration of love and affection and one dollar. In 1886 he executed a will, which was not probated, on account of a subsequent marriage, in and by which he devised to his daughter five dollars, reciting: "She having heretofore received the sum of \$1000 in real estate. \* \* \* My several sons all had land and other property to the value of at least \$2000 each :" Held, that the words used in the will were not sufficient to afford evidence of an advancement to the daughter and sons.

APPEAL from the Circuit Court of Stark county; the Hon. SAMUEL S. PAGE, Judge, presiding.

Mr. ALLEN P. MILLER, and Mr. FRANK THOMAS, for the appellants:

If the deceased had entered the charges on the leaves of a diary, journal, day-book or ledger, they would not be entitled to greater weight, and doubtless would not express his intention and the facts more clearly than as stated in said instrument. The statements are under the signature and seal of the deceased, and while the words "charge" and "advancement" are not found therein, yet the facts are positively set forth, and agree with the great weight of testimony in the case.

No particular formality or form of words is required to indicate an advancement or its acceptance by the child, (*Brown v. Brown*, 16 Vt. 197, *Bulkeley v. Noble*, 2 Pick. 337, *Holliday v. Wingfield*, 59 Ga. 206,) unless so prescribed by statute. *Sayles v. Baker*, 5 R. I. 457; *Mowry v. Smith*, id. 255; *Treadwell v. Cordis*, 5 Gray, 341; *Holliday v. Wingfield*, 59 Ga. 206; Cal. Civ. Code, sec. 1397.

Our statute does not prescribe any particular form of words in which the charge shall be made, or the system of book-keeping that shall be adopted,—whether it shall be double or single entry.

A conveyance of land by a parent to a child, either directly or by payment of the purchase money, and having the deed

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Briefs for the Appellees.

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made to the child, is, in the absence of proof to the contrary, presumed to be an advancement. *Murphy v. Nathans*, 46 Pa. St. 508; *Weaver's Appeal*, 63 id. 309; *Wormley v. Wormley*, 98 Ill. 544; *Miller's Appeal*, 40 Pa. 57.

As to the competency of the declarations of parents made subsequently to gifts, see *Merkel's Appeal*, 89 Pa. St. 340; *McClintock's Appeal*, 58 N. H. 152; *Clark v. Kingsley*, 37 Hun, 246; *Camp v. Camp*, 18 id. 217.

**Mr. JAMES H. MILLER**, for the appellees:

Under the statute of 1845 alone, an advancement is a question of intent. The intent must be proved to have existed at the time of the transaction, and by contemporary acts and declarations of the parties. *Wallace v. Reddick*, 119 Ill. 151; *Comer v. Comer*, id. 170; *Merkel's Appeal*, 89 Pa. St. 340.

The burden of establishing an advancement is upon the expectants to show the transaction to be other than it appears. (*Miller's Appeal*, 107 Pa. St. 222.) But this case is governed by the statute of 1872. (Hurd's Stat. 1887, p. 505, secs. 4-7; *Simpson v. Simpson*, 114 Ill. 603.) And I take it now, that there is no presumption of law in this case, as laid down in *Taylor v. Taylor*, 4 Gilm. 303, and *Grattan v. Grattan*, 18 Ill. 167.

An advancement which is not evidenced in the manner required by the statute, is, in legal effect, no advancement at all, however clearly it may appear it was so intended. *Long v. Long*, 118 Ill. 638.

**Mr. MILES A. FULLER**, for Abraham R. Thomas and guardian *ad litem* for Owen W. Thomas, Jr.:

The following cases are referred to, to show that no matter what the intent of the ancestor may be, unless the gift is expressed in writing to be an advancement, it can not be recognized as such: *Long v. Long*, 118 Ill. 650; *Comer v. Comer*, 119 id. 179; *Wallace v. Reddick*, id. 158.

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Opinion of the Court.

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Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

Owen W. Thomas died on the 11th day of November, 1886, leaving him surviving, a widow, Sarah Thomas, a wife of a second marriage, and the following children: Abraham R. Thomas, Hannah R. Galbraith, Esther F. Wilkinson, Mary J. Wilkinson and Hannah R. Witt; also a grandson, Owen W. Thomas, a son and only heir of Owen W. Thomas, Jr., deceased. On the 18th day of March, 1886, Owen W. Thomas executed a will, but it was not admitted to probate, on the ground of his subsequent marriage, and his estate was settled as an intestate estate. This bill was brought by Esther F. Wilkinson, Mary J. Wilkinson and Anna R. Witt, for a partition of the real estate of which Owen W. Thomas died seized. The widow, Sarah Thomas, and the three other heirs, were made defendants to the bill. In an amended bill it was in substance alleged, that five of the heirs had received various amounts of real and personal property by way of advancement on their respective shares in the estate, and on a partition of the real estate the bill prayed that the amount each one had received should be deducted from that portion of the estate to be allotted to him or her on final division. Answers were put in to the bill, and replications having been filed, the cause was referred to the master, and he was directed to take the evidence and report to the court, with his conclusions of law and fact. As to the rights of the parties in the premises the master reported as follows: First, to the widow, Sarah Thomas, dower interest in the premises of deceased; second, to Hannah R. Galbraith the one-sixth part of said premises, subject to the widow's dower, and less a charge of \$500 received by her as an advancement; third, to Owen W. Thomas, Jr., the one-sixth part, subject to dower, and less a charge of \$2000; fourth, to Abraham R. Thomas the one-sixth part, subject to dower, and less a charge of \$2000; fifth, to Anna R. Witt the one-sixth part, subject to dower, and less a charge of \$300; sixth, to Mary

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Opinion of the Court.

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J. Wilkinson the one-sixth part, subject to dower, and less a charge of \$200; seventh, to Esther F. Wilkinson the one-sixth part, subject to dower, there being no charge or advancement. Exceptions were filed to the report, which were overruled by the master, but on the hearing of the exceptions by the court, the findings were set aside as to the advancements, and a decree rendered granting the widow dower in the premises, and dividing the residue equally between the six heirs.

No question is presented in regard to the decree awarding dower to the widow, Sarah Thomas, but it is claimed by appellants that Owen W. Thomas made an advancement to his daughter Hannah R. Galbraith of \$500, and to his two sons, Owen W. Thomas, Jr., and Abraham R. Thomas, \$2000 each, and that the court erred in not requiring each of them to account for the amount so advanced, on the division of the premises described in the bill.

It appears from the evidence, that on the first day of July, 1869, Owen W. Thomas and wife conveyed to Hannah R. Galbraith lot 5, in Culbertson's eastern addition to the town of Toulon, and this is the property claimed to have been advanced to her. There is some evidence in the record that Hannah R. Galbraith made statements, on different occasions, that her father had given her \$1000 in town property on her share of his estate. The complainants also proved that the grantor in the deed had made statements, at different times, to the effect that he had given his daughter a deed of the property, and the amount was at least \$1000, advanced on her share of his estate. But it is manifest that an advancement can not be established by evidence of this character. Section 7 of the act of 1872, in regard to descent of property, declares: "No gift or grant shall be deemed to have been made as an advancement unless so expressed in writing, or charged in writing by the intestate as an advancement, or acknowledged in writing by the child or other descendant." Under this statute, an advancement can not be created by parol declarations or state-

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Opinion of the Court.

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ments; but, on the other hand, in order to create a valid advancement, the gift or grant must be expressed in writing as an advancement, or charged in writing by the intestate, or acknowledged in writing by the child or other descendant. This is the plain provision of the statute, and it can not be disregarded. The deed, on its face, discloses nothing from which the inference can be drawn that the property conveyed was intended as an advancement, but rather the contrary. The consideration expressed is as follows: "For and in consideration of their love and affection for their daughter, and of \$500 in hand paid."

But it is said the will of the deceased has an important bearing on the question. The testator, after making provision in the will for some of his daughters, then declares: "And to my daughter Hannah R. Galbraith the sum of five dollars, she having heretofore received the sum of \$1000 in real estate, situated in John Culbertson's eastern addition to the town of Toulon, in the county of Stark and State of Illinois, which was worth \$1500 at the time, and all without interest for twenty years. My several sons all had land and other property to the value of at least \$2000 each." The language here used, giving it the most favorable view for complainants, can only be regarded as a mere declaration of the testator that he had on a prior occasion given his daughter \$1000; but there is no intimation that the amount had been given by way of advancement, and the mere fact that he had made a present to his daughter, and had never charged it as an advancement, can not be regarded as giving aid to the position of complainants. As said in *Comer v. Comer*, 119 Ill. 180, it is not every gift that a parent may make the child that is to be considered an advancement. It should appear in some way it was intended as an advancement, before the child's part will be charged with it.

We now come to the question of advancement to the two sons, Abraham R. and Owen W. Thomas, Jr. On the 2d day

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Opinion of the Court.

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of March, 1876, Owen W. Thomas and his wife conveyed to Abraham R. Thomas eighty acres of land in Mahaska county, Iowa. The deed was made, as recited therein, "in consideration of love and affection and one dollar." On the same date the same parties conveyed to their son Owen W. Thomas, Jr., another eighty-acre tract of land in Mahaska county, Iowa. The deed recites, "for the consideration of the sum of two dollars in hand paid, and the love and natural affection we have for our son." The two deeds, and the declaration in the will of the deceased that "my several sons all had land and other property to the value of at least \$2000 each," is the only evidence in writing relied upon to establish that the lands conveyed in the two deeds were intended as an advancement. There is nothing contained in either deed which in the least shows, or tends to show, that the lands conveyed were intended as an advancement. The lands may have been conveyed as a gift, or the conveyance may have been made in consideration of services rendered by the sons to their father; but however that may have been is immaterial. So far as the question here involved is concerned, it is enough that there is nothing appearing on the face of the deeds indicating that the lands were conveyed by the grantor, or accepted by the grantees, as an advancement. As to the clause in the will, we do not think it has any special bearing on the question. It is but a declaration of the testator that his sons had had property of the value of \$2000. The declaration was probably thrown in as an excuse for not devising more of his property to his sons. Suppose he had given his sons property, or sold it to them, unless the transaction was made as an advancement it could have no bearing on the future disposition of the estate. There is nothing in the deeds or the will which brings the transaction within the terms of the statute.

We have not alluded to the declarations of Owen W. Thomas which have been proved, nor to the conversations between him and his sons, for the obvious reason that an advancement can

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Syllabus.

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not be established by parol, and hence such evidence can have but little bearing on the case. The legislature has seen proper to enact a law, which, in plain and clear language, declares that no gift or grant shall be deemed to have been made as an advancement unless so expressed in writing, or charged in writing, or acknowledged in writing by the child. Nothing of this character occurred here, and we perceive no ground upon which it can be held that either of the parties can be charged with money or property received from their father by way of advancement.

The decree of the circuit court will be affirmed.

*Decree affirmed.*

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128	870
53a	631
128	870
191	*817
128	870
197	*290

CLIFTON H. MOORE

v.

SYLVANUS SHURTLEFF *et al.*

*Filed at Springfield May 14, 1889.*

1. INVERSE ORDER OF ALIENATION—*application of the rule in the case of a prior mortgage.* The owner of certain lots of land, numbered 4 and 5, subject to a trust deed on them and other property, sold lot 5 to A, and afterward sold lot 4 to B. A afterwards sold and conveyed lot 5, as follows, and in the order indicated: to C the north part thereof, to D the south part, and, lastly, to E the middle part: *Held*, that if lot 5 were sold without conditions, lot 4, subsequently conveyed, would be first charged with the whole sum due on the trust deed, and after it should be exhausted, the subdivisions of lot 5 would be liable in the inverse order in which they were conveyed by A.

2. The general rule of inverse order, above stated, is never applied when the parties, by an agreement in their deed, have charged a mortgage upon land in a different manner,—as when, by the terms of the sale of a part of the premises, the mortgage is made a common charge, or the part conveyed is subjected to a proportionate part of the incumbrance. In such case, if there be no specific agreement as to the proportion which each part is to bear, contribution must be made according to the relative value of each part.

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Brief for the Appellant.

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3. SAME—*of an agreement as to liability of separate parcels sold.* A sold to B his interest in lot 5, which, with lot 4, was subject to a deed of trust, together with other land. A's deed provided that the sale was subject to the deed of trust of \$2000, to secure the payment of which, ten acres of other land had been set aside, by decree of court, to be sold, and the proceeds applied on the debt; that after the sale of said ten acres, and application of the proceeds, A was to further protect B to the amount of \$200 against the trust deed, and no more, B to pay any excess due thereon over the proceeds of the ten-acre tract, and said \$200; that if the proceeds of the ten acres should be more than was required to satisfy the deed of trust, the excess should be paid to A, and that said B "hereby agrees to save and forever keep the said grantor harmless from the payment of any sum by reason of said trust deed, other than herein provided." After this sale, A sold lot 4 to C, and B subdivided and sold and conveyed lot 5 in three parcels: *Held*, that by the stipulation or agreement in A's deed to B, it was the intention of the parties, that instead of lot 5 being held *pro rata*, as it would have been under the first clause, it should be held only liable to the extent, but no further, than the mortgage debt should exceed the proceeds of the ten acres, and \$200.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of DeWitt county; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. MOORE & WARNER, for the appellant and Shurtleff:

The rule that mortgaged lands are liable to the debt in the inverse order of their alienation, is subject to two exceptions: First, when, upon examination of the various deeds, the court can see that it was the intent of the parties to change the rule; second, when the carrying out of the rule would work great injustice. 2 Jones on Mortgages, secs. 1092, 1620-1625, and cases cited in note 4; *Hoy v. Bramhall*, 19 N. J. 593; *Briscoe v. Power*, 47 Ill. 447; *Vogel v. Brown*, 120 id. 338.

On the point that the parties can change the rule by contract, we refer the court to 2 Jones on Mortgages, sec. 1625, p. 551; *Life Ins. Co. v. Boughrum*, 24 N. J. Eq. 44; *Pancost v. Duval*, 26 id. 445; *Briscoe v. Power*, 47 Ill. 447; *Halsey v. Reed*, 9 Paige, 445.

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Brief for the Appellee Vogel.

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This case is similar to the one at bar. *Warren v. Boynton*, 2 Barb. 13; *Tony v. Bank of Orleans*, 9 Paige, 649; *Zabriskie v. Salter*, 80 N. Y. 555; *Mickle v. Maxfield*, 42 Mich. 304; *Niles v. Harmon*, 80 Ill. 396.

Upon the construction of deeds, see *Cooper v. Cooper*, 76 Ill. 57; *Finley v. Steele*, 23 id. 56; *Louk v. Woods*, 15 id. 258; *Voris v. Renshaw*, 49 id. 425; *City of Alton v. Transportation Co.* 12 id. 38; *Hawk v. McCullough*, 21 id. 220; *Manufacturing Co. v. Wagon Co.* 91 id. 230; *Sharp v. Thompson*, 100 id. 447; *Maynard v. Maynard*, 4 Edw. 711; *Bradstreet v. Clark*, 12 Wend. 602; *Covenhoven v. Shuler*, 2 Paige, 122; *Brownfield v. Wilson*, 78 Ill. 467; *Gallaher v. Herbert*, 117 id. 160; *Lehndorf v. Cope*, 122 id. 317; *Park v. Park*, 9 Paige, 107; *Morritt v. Jessop*, 94 id. 158; *Rountree v. Talbott*, 89 id. 246; *Blake v. Hawkins*, 8 Otto, 337; *Smith v. Stevens*, 10 Wall. 226; *Wilson v. Eden*, 11 Beav. 289.

Hutchin shows, by his acceptance of the deed with this clause inserted, that he meant and intended to let the rule be changed, and took the land subject to the trust deed. The intent of the parties to the deed is what this court desires to learn, and then carry it out. Chitty on Contracts, pp. 74-76, and cases cited in note 2, on page 74; *Bolman v. Lohman*, 79 Ala. 63; *Topliff v. Topliff*, 122 U. S. 121, and cases cited; *Field v. Leiter*, 118 Ill. 17; *Kuecken v. Voltz*, 110 id. 269; *Insurance Co. v. Whitehill*, 25 id. 466; *Coey v. Lehman*, 79 id. 173; *Kimball v. Custer*, 73 id. 389; *Harpstrite v. Vasel*, 3 Bradw. 121; *Benjamin v. McConnell*, 4 Gilm. 536; *Walker v. Tucker*, 70 Ill. 527.

Messrs. GRAHAM & MONSON, for the appellee Vogel:

Aliened mortgaged premises must be sold in the inverse order of alienation, to satisfy the mortgage indebtedness. 2 Jones on Mortgages, secs. 1621, 1091.

The same rule applies where the mortgagor has conveyed the mortgaged premises in different parcels, and the grantees

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Opinion of the Court.

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of these parcels again convey them in parcels. 2 Jones on Mortgages, sec. 1621; *Vogel v. Brown*, 120 Ill. 338; *Iglehart v. Crane*, 42 id. 261.

Subsequent purchasers of portions of the mortgaged premises are bound by the constructive notice furnished by the registry of prior conveyances of any portion of the mortgaged premises. *Iglehart v. Crane*, 42 Ill. 261.

Mr. R. A. LEMON, for the appellees Vogel and Frank Adkisson.

Mr. JUSTICE WILKIN delivered the opinion of the Court:\*

Thomas B. Adkisson, being the owner of certain real estate in DeWitt county, known as lots 4 and 5, the former subject to the homestead and dower rights of his mother, and both encumbered by a trust deed to the amount of \$458.27, (as found by the court below,) sold and conveyed the same in the following order, viz.: January 6, 1876, to Andrew Hutchin, lot 5; February 10, 1876, to appellant, Clifton H. Moore, lot 4. Hutchin reconveyed lot 5 in subdivisions, as follows: February 26, 1876, to Sylvanus Shurtleff, the north part; same date, to P. H. Mills, the south part; and March 6, 1876, to Jacob Vogel, the middle part. Afterward, January 20, 1882, the part so conveyed to appellee Sylvanus Shurtleff, was sold, to satisfy a balance then due on the before mentioned trust deed, for \$685.66, and afterward redeemed or repurchased by the said Shurtleff. On the 13th of the following June he filed this bill for contribution. On a hearing in the circuit court of said DeWitt county he obtained a decree for the sum of \$685.66, with six per cent interest from the date of said sale to the rendering of the decree, amounting at that time to \$916.54. One-half of this amount was charged to and made a lien on that part of lot 5 conveyed by Hutchin to Jacob Vogel, and

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\*For a detailed statement of the facts in this case, other than as given in the opinion, see *Vogel v. Brown et al.* 120 Ill. 338.

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Opinion of the Court.

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lot 4 conveyed by Adkisson to appellant, Moore, the former with \$191.14, and the latter with \$267.14, the former also being charged with two-tenths of all the costs of that proceeding, and the latter with three-tenths thereof. This decree being affirmed by the Appellate Court, appellant brings the record here on a certificate of importance made by that court. Jacob Vogel and Frank Adkisson, appellees, assign cross-errors.

No question is raised as to the right of appellee Shurtleff to have contribution, nor is it contended that the amount found by the court below as chargeable against Thomas B. Adkisson is incorrect; neither is it denied that that amount is properly chargeable against the said lots 4 and 5; but the question is, in what order shall they be charged. There seems to be, and, in fact, there is, no room for controversy as to the general rule of law in this State applicable to such cases. If the conveyance of lot 5 to Hutchin had been without conditions, lot 4, subsequently conveyed to appellant, Moore, would have been first chargeable with the whole amount due from Thomas B. Adkisson on the trust deed, and after it had been exhausted, the subdivisions of lot 5 would have become liable in the inverse order in which they were conveyed by Hutchin. 2 Jones on Mortgages, (2d ed.) secs. 1620, 1621; *Iglehart et al. v. Crane & Wesson*, 42 Ill. 261.

Ignoring all conditions or stipulations in the Hutchin deed, and relying on this general rule, appellee Vogel insists that the court below erred in charging lot 5 with any portion of said sum of \$458.27, except upon condition that lot 4 should prove insufficient in value to satisfy the same.

The Hutchin deed contains the following agreement: "Said land being sold, and this deed made and accepted, subject to a certain trust deed or mortgage made by Thomas B. Adkisson, and Elizabeth A., his wife, Corrilla Adkisson and Horace Adkisson, to Charles F. Emery, dated June 1, 1874, recorded June 13, 1874, in book No. 12 of mortgages, of records of DeWitt county, Illinois, at page 292, to secure the payment

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Opinion of the Court.

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of \$2000, to pay which said trust deed or mortgage, by the terms of a decree of the circuit court of DeWitt county, Illinois, rendered at the December term, 1875, of said court, the following described tract of land is set apart to be sold, and the proceeds applied to the payment of said trust deed or mortgage. \* \* \* After which said ten acres is so sold and the proceeds so applied, then the said T. B. Adkisson shall be bound to further protect said Hutchin to the amount of \$200 against said trust deed, and no more, said Hutchin to pay any excess due thereon over the proceeds of said ten acres, and said sum of \$200. And in case said ten acres shall produce more than sufficient to pay said trust deed, then such excess shall be paid to said T. B. Adkisson. And the said Hutchin hereby agrees to save and forever keep the said grantor harmless from the payment of any sum by reason of said trust deed, other than herein provided; that after the master in chancery of said county shall, under said decree, sell said ten acres, and have paid off and discharged said trust deed or mortgage to said Emery, he shall surrender the same, and the notes and bonds therein described, to the grantors therein, and pay to the parties to said decree, and not to said Andrew Hutchin, the excess arising from such sale, the said Hutchin not to be held responsible for the performance of the duty of said master in chancery, it being distinctly understood that said Hutchin is only bound to protect said T. B. Adkisson against the payment of money by reason of said trust deed, but that he is not required to protect Corrilla Adkisson or Horace Adkisson. As to said Corrilla and Horace Adkisson, the said Hutchin is hereby substituted in place of T. B. Adkisson."

The general rule of inverse order above stated is never applied where the parties, by an agreement in their deed, have charged a mortgage upon land in a different manner, "as, where by the terms of sale of a part of the premises the mortgage is made a common charge, or that part conveyed is subjected to a proportionate part of the incumbrance. In such

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Opinion of the Court.

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cases, if there be no specific agreement as to the proportion which each part is to bear, contribution must be made according to the relative value of each part." (2 Jones on Mortgages, sec. 1625; *Briscoe et al. v. Power*, 47 Ill. 447.) It is clear, therefore, that notwithstanding lot 5 was conveyed before lot 4, under the agreement between the parties, it was not relieved from the lien of said trust deed, but remained primarily liable, so far as made so by the terms of said agreement. The position of appellee Vogel can not be maintained.

Appellant contends that by a fair construction of said stipulation, Hutchin became liable for the whole amount of said incumbrance, and that therefore lot 4, subsequently conveyed to him, could only be held secondarily liable. In support of this position, it is insisted that by the latter clause, "it being distinctly understood that said Hutchin is only bound to protect said T. B. Adkisson against the payment of money by reason of said trust deed, but that he is not required to protect Corrilla and Horace Adkisson," etc., Hutchin abandoned his claim for the \$200, and agreed to become liable for the whole of the debt, after the proceeds of the ten acres should be applied. This position is clearly untenable. The whole agreement must be construed together. This clause is for the protection of Hutchin, not to increase his liability. By its terms he is to protect Adkisson only, and not others. How protect him? Clearly, according to the terms of the agreement previously stated.

It is again insisted, that by the clause, "T. B. Adkisson shall be bound to further protect said Hutchin to the amount of \$200 against said trust deed, and no more, said Hutchin to pay any excess due thereon over the proceeds of said ten acres, and said sum of \$200," Hutchin assumed the mortgage debt over and above the proceeds of the ten acres, and the promise of payment of \$200 by Adkisson was but a personal liability. The Appellate Court held against this view, and, we think, correctly. When the whole agreement is considered, the inten-

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Opinion of the Court.

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tion of the parties is shown to be, that instead of lot 5 being held *pro rata*, as it would have been under the first clause, it should be liable to the extent, but no farther, than the debt should exceed the proceeds of the ten acres, and \$200. It is, in effect, but an agreement between the parties that Hutchin should pay all of the mortgage debt remaining after the proceeds of the ten acres should be applied thereon, except *the sum of \$200*. We think the circuit court decided correctly in holding that both lots were liable to contribute to the payment of said sum of \$458.27, and that it was properly apportioned under the agreement in Hutchin's deed.

It follows, from what has already been said, that so much of that amount as is chargeable against lot 5 was properly decreed against the part conveyed to appellee Vogel, he being the last purchaser from Hutchin. His claim, therefore, that the other subdivisions of said lot should be charged *pro rata*, can not be maintained. It is true that the rule of inverse order, both as to first and subsequent grantees of incumbered property, will not always be enforced, and never when it would work great injustice, or when, upon examination of the various deeds, the court can see that it was the intent of the parties to change the rule. But we find nothing in this record tending to show that its application would work injustice, or that the parties intended to change it, except in the Hutchin deed, as before stated.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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Syllabus. Brief for the Appellant.

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128	378
35a	634
128	378
51	265
128	378
157	324
128	378
55a	428
128	378
86a	25

LEWIS UMLAUF

v.

VICTORIA UMLAUF.

*Filed at Ottawa May 16, 1889.*

1. DIVORCE—*custody of the children.* Although the general rule that the custody of the children will be given to the party in whose favor the divorce is granted, is never enforced when the welfare of the children will be injuriously affected by its enforcement, yet it must be clearly shown that their welfare does really require the abrogation of the rule.

2. The right of the father is superior to that of every other person, and can only be made to yield when it is manifestly inconsistent with the health and welfare of the child.

3. In this State it may sometimes be proper to give to the mother the custody of the children in case of a divorce, even when the divorce is granted on account of her desertion of her husband.

4. The controlling consideration with a court of equity, when both the husband and the wife are equally fit to have the care of the children, is the welfare and best interests of the children, and not the gratification of either parent. In such cases, the custody is often given to the mother when the health or tender years of the children require her care and attention. The common law right of the father to the custody of his infant child will be made to yield to the discretionary power over the subject vested by the statute in the court.

5. In this case the considerations are stated which induce the court to give the custody of the oldest son, aged about ten years, to the father, and the youngest son, aged about seven, to his mother.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. EGBERT JAMIESON, Judge, presiding.

Mr. WILLIAM T. AMENT, Mr. C. C. STRAWN, and Mr. EDMUND S. HOLBROOK, for the appellant:

A husband, on divorce for the fault of the wife, who is in all respects a proper, fit and competent person to have the custody of his minor sons, aged, respectively, seven years, and

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Brief for the Appellee.

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nine years and six months, who is able and willing to have their custody, care and tuition, is entitled to their custody. 2 Bishop on Marriage and Divorce, secs. 532, 543; Stewart on Marriage and Divorce, sec. 402; Church on Habeas Corpus, secs. 441-443, and authorities cited; *State v. Stigall*, 2 Zabr. 286; *People v. Humphrey*, 24 Barb. 523; *Olmstead v. Olmstead*, 27 id. 9; *People v. Mercein*, 3 Hill, 399; *Clark v. Bayer*, 32 Ohio, 310; *Waring v. Waring*, 100 N. Y. 570; Rev. Stat. chap. 40, sec. 18; *Miner v. Miner*, 11 Ill. 49; *Hewitt v. Long*, 76 id. 406;

The facts in this case, *per se*, show that the best interests of these children are secured in their father's care and custody.

A husband who, on divorce for the fault of the wife, is in every respect a proper, fit and competent person to have the custody of his minor sons of proper age, and who is willing and able to support and maintain them in his own home, can not and ought not to be compelled, against his will, to maintain them elsewhere.

Messrs. BLANKE & CHYTRATS, for the appellee:

When a divorce shall be decreed, the court may make such order touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just. Rev. Stat. chap. 40, sec. 18.

This statute has been repeatedly construed by this court to give the chancellor full discretion in the exercise of the powers conferred, regardless of the common law rights of the parties. *Reavis v. Reavis*, 1 Scam. 242; *Deenis v. Deenis*, 79 Ill. 74; *Hewitt v. Long*, 76 id. 399.

No certain rule can be laid down on the custody of children, except that their best interests must be consulted. *Cowls v. Cowls*, 8 Ill. 440; *Hewitt v. Long*, 76 id. 408.

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Opinion of the Court.

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Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

Appellant filed a bill for divorce against appellee in the Superior Court of Cook County, and obtained a decree against her on April 22, 1887. The decree granted him a divorce on account of her desertion, but gave her the custody of the two children, one, a boy named Arthur, nine years old, and the other, a boy named Oscar, six years and six months old, and required him to pay her \$40.00 monthly for the support of the two sons, being \$20.00 per month for each, "until the further order of the court." The decree found that both appellant and appellee were fit and proper persons to have the care, custody and tuition of the children, but it also found that, "on account of the tender ages of and the present physical condition of the said children, it is for their better welfare that they remain under the custody, care and tuition of the defendant, their mother, in whose custody they have been for the past six years."

Appellant took no appeal from this decree, and has never sought to have it reviewed by writ of error. Though favorable to him upon the question of the divorce, it was against him, so far as the custody of the children, and the payment of money to the appellee for their support, were concerned. He submitted to the decree, and made the monthly payments from the date of the rendition of the decree on April 22, 1887, to the first Monday of November, 1887. On October 13, 1887, he filed his petition in the same court, asking for the custody of the children. This petition, on final hearing, was dismissed.

It may sometimes be proper to give the mother the custody of the children even where the divorce is granted on account of her own desertion of her husband. (*Reavis v. Reavis*, 1 Scam. 242; *Deenis v. Deenis*, 79 Ill. 74). The controlling consideration with a court of equity, where both the husband and the wife are equally fit to have the care of the children, is the welfare of the children, and not the gratification of either parent. In such cases, the custody is often given to the mother, where

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Opinion of the Court.

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the health or tender years of the children require her attention. (2 Bishop on Mar. & Div. 532; Stewart on Mar. & Div. sec. 402; *Waring v. Waring*, 100 N. Y. 570). Under our statute, the court may make such order touching "the care, custody and support of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just." (Rev. Stat. chap. 40, sec. 18). The common law right of the father to the custody of the infant child will be made to yield to the discretionary power over the subject vested by the statute in the court, (*Hewitt v. Long*, 76 Ill. 399), where the best interests of the child demand it.

We are not prepared to say, that the decree of April, 1887, based upon evidence not now before us, was not right and proper at the time it was rendered. Indeed, the conduct of the defendant for six months thereafter, and the language contained in his petition, and in his brief filed in this court, would seem to indicate that he himself considered the decree as authorized by the facts as they then existed.

The 18th section of the Divorce Act provides, however, that "the Court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children as shall appear reasonable and proper." The question then arises whether or not it would have been reasonable and proper to modify or change the terms of the decree, as to the custody of either or both of these boys, when appellant's petition was dismissed in December, 1887.

As to the younger boy, we are of the opinion, that it was right to allow him to remain with his mother. He was barely seven years of age in December, 1887. In addition to being a delicate boy, he was lame. He is spoken of as being pale and as having been so for several years. One of the physicians says: "In the past I have treated the younger one the most, treated him for typhoid fever and for malarial fever, chiefly typhoid, during the time specified from March to June

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Opinion of the Court.

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of last year." He had not yet been shown to be strong enough to attend regularly at school. He was entered in one of the public schools in the second week of September, 1887, and left in the following month, attending five weeks altogether. The evidence shows, that he has evinced a strong attachment for his mother, and a decided disinclination to go to his father. To have taken him away from his mother, against his will and in his feeble condition, may have proved injurious to his health.

As to the older boy, we think, under all the facts in the case, his custody should have been awarded to his father. It is true, that, according to the testimony of the two physicians who have given their evidence in the case, he was a boy of an exceedingly delicate and nervous temperament, and might become afflicted with the disease, known as St. Vitus' dance, unless properly cared for. But he had been going to school for nearly two years, and was at school most of the time in the spring, summer and fall of 1887. At the time of the hearing he was nearly ten years old. His father met him on the street several times in May and June, 1887, and conversed with him, and he seemed to be well and in good spirits. He manifested a willingness to go with his father and to be in his company. He seemed to have more affection for his father than his younger brother exhibited. There is nothing in the evidence, which produces the impression, that it would injure his health or his spirits to take him from the custody of his mother. Henry M. Coburn, an attorney, who was with appellant during one of his interviews with the older son, and who appears to be an entirely disinterested witness, says: "Arthur said he would like to see his father frequently, but he was afraid his mother would punish him."

It has not been made to appear to us, that the desertion, of which appellee was found guilty, was induced by the fault of appellant. Although the general rule, that the custody of the children will be given to the party in whose favor the divorce is granted, is never enforced when the welfare of the children

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Opinion of the Court.

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will be injuriously affected by its enforcement, yet it must be clearly shown, that their welfare does really require the abrogation of the rule. After a careful study of this record, we are not led to the conclusion, that the true interests of the oldest son, either mental, moral or physical, will suffer in any way by placing him under the control of his father.

The proof shows that the appellant is a man of good character. There is nothing to indicate, that he is unworthy of being intrusted with the care of his son. He has a comfortable home of his own, well supplied with books and the usual and necessary comforts of life. He has two daughters by a former marriage, who keep house for him.

It is also true that the appellee is a good woman. There is not one word of proof to the contrary. But she is a dress-maker by trade and pursues that business, having under her charge, most of the time, quite a number of employees. She occupies a house of four stories, renting the rooms on the third and fourth floors, and reserving for herself the first and second floors. Being thus actively engaged in business, she can not devote to both of her boys as much time and attention, as she would be able to give them if she were differently situated. Particularly is this the case with Arthur, who, as the older of the two, will not be as much under her notice as his younger and more afflicted brother. Unquestionably no other person can feel for a boy as his mother does, or show to him the love and affection, which he receives from his mother. But the rule is "that the right of the father is superior to that of every other person, and can only be made to yield when it is manifestly inconsistent with the health and welfare of the child." (3 Smith's Lead. Cases in Eq. 375.) We can not say, that it will be "manifestly inconsistent with the health and welfare of the child," Arthur, that he shall be reared in his father's home, and under the care of his father and his older sisters.

The judgment of the Appellate Court and the decree of the Superior Court are reversed, and the cause is remanded to the

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Syllabus.

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Superior Court, with directions to so modify its decree as to give the custody of the oldest child to the appellant, and to so reduce the amount to be paid monthly by the appellant as to require him to pay appellee \$20.00 per month, instead of \$40.00 per month, for the support of the youngest child, and with further directions to provide that both appellant and appellee shall have the privilege of visiting and freely communicating with both of said children. The costs of this proceeding must be paid by the appellant.

*Judgment reversed.*

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THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY

v.

ARTHUR C. HARPER.

*Filed at Ottawa May 16, 1889.*

128	384
35a	490
128	384
190	2504
94a	1341

1. *JUROR—question of discharge pending the trial, for supposed prejudice.* When a juror was accepted, it did not appear that he was in any manner prejudiced against the defendant. During the trial, however, he assumed to cross-examine some witnesses, but there was nothing in the nature of the questions to show that he had become incompetent to discharge the duty of a juror. The defendant's counsel moved the court to exclude the juror from the panel, which the court refused: *Held*, no error in overruling the motion.

2. *BILL OF EXCEPTIONS—what it should contain—of instructions not copied into the bill.* Where instructions given on the trial of a cause are not written into the bill of exceptions, they can not be considered in this court. In this case, the original bill of exceptions was brought up by agreement, but the instructions were not copied therein, though they were sent up with the transcript: *Held*, that they could not be treated as part of the record.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN P. ALTEGELD, Judge, presiding.

Mr. E. WALKER, for the appellant.

Mr. E. A. SHERBURNE, for the appellee.

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Opinion of the Court.

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Per CURIAM: But two grounds are relied upon for a reversal of the judgment: First, because the court denied defendant's motion to exclude one of the jurors from the panel after the trial had begun; and second, because the first instruction given for the plaintiff is erroneous.

During the trial, one of the jurors undertook to examine a witness, and asked him a number of questions, which were answered by the witness. Counsel for defendant, claiming that the examination conducted by the juror disclosed the fact that he was prejudiced against the defendant, entered a motion to exclude the juror from the panel. When the juror was accepted on the panel to try the cause, it did not appear that he was in any manner prejudiced against either party, and while the juror, in his attempt to examine a witness, assumed a duty which did not belong to him, and which, perhaps, ought to have been checked by the court at the outset, still there is nothing in the nature of the questions which disclosed the fact that the juror had become incompetent to discharge his duty as a juror, and we do not think the court erred in denying defendant's motion to exclude the juror from the panel.

In regard to the other question, upon an examination of the record it will be found that the instruction does not appear in the bill of exceptions, and hence it can not be regarded as a part of the record. In this case, as in *Chicago, Milwaukee and St. Paul Railway Co. v. Yando*, 127 Ill. 214, the original bill of exceptions was brought up by agreement, but the instructions were not copied into the bill of exceptions, but were sent up with the transcript. In the case cited, it was held that the instruction, not being in the bill of exceptions, formed no part of the record, and could not be considered. There is no distinction between the record in the case cited and this one, and the decision in that case must control here.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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Syllabus. Brief for the Appellant.

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WILLIAM Y. GRANT

7.

A. C. BADGER *et al.*

*Filed at Ottawa May 16, 1889.*

1. LIMITATION—*act of 1839—payment of taxes—of an illegal tax.* In order to establish title by limitation under the act of 1839,—section 8 of the Revised Statutes of 1845,—the person in possession of the premises under color of title is required to pay all taxes *legally*, assessed on the property for seven successive years. He is not required to pay a void tax.

2. In 1873 the legislature passed an act for the levy and collection of city taxes, under which a lot was taxed \$5.70, which sum the holder of color of title paid. The courts having adjudged the act unconstitutional, in 1877 the legislature authorized the levy and collection of uncollected back taxes, requiring credit to be given to those who had paid the prior illegal levy. Under this act the city levied a tax on the lot of \$6.15, which included forty-seven cents of an illegal tax, being for interest on void city bonds: *Held*, that the amount paid the city in 1874 was a payment under the act of 1877, and that the holder of the color of title was not bound to pay the illegal tax for interest on city bonds. The credit allowed by the act of 1877, in such case must be taken as applied on the valid taxes, and not on a void tax.

APPEAL from the Circuit Court of Will county; the Hon. CHARLES BLANCHARD, Judge, presiding.

Mr. EGBERT PHELPS, for the appellant:

The judgment under which the tax deed was made was void, as containing illegal taxes. The owner not appearing, may attack the judgment collaterally. *Nail Co. v. People*, 98 Ill. 399; *Gage v. Bailey*, 102 id. 12; *Riverside Co. v. Howell*, 113 id. 263; *Gage v. Busse*, 114 id. 589.

That the item in the tax levy for "Interest on Rolling Mill Bonds" is illegal and absolutely void, has already been decided by this court in *English v. The People*, 96 Ill. 566, which was an appeal from a judgment for taxes, involving the interest and part of the principal of this same series of rolling mill

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Brief for the Appellees.

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bonds for which appellant's property was taxed. See, also, *Bissell v. City of Kankakee*, 64 Ill. 249.

We claim, as we shall show hereafter, that the forty-five cents for which the tax judgment was obtained against the land, was solely and exclusively for its *pro rata* share of interest on the rolling mill bonds, and hence, under the decision in 96 Ill. *supra*, illegal and void. But however that may be, it can not be denied that that illegal item of interest "entered into and formed a part of the judgment, and the sum for which the land was sold." In such case, this court has decided that the sale is void. *McLaughlin v. Thompson*, 55 Ill. 251; *Riverside Co. v. Howell*, 113 id. 262.

Appellant, in 1875, paid \$5.70 as in full of city taxes on this lot for 1874. Under section 3 of the law of May 5, 1877, (Sess. Laws of 1877, p. 57,) this payment became a trust fund in the hands of the city, to be applied upon city taxes for 1874 under the subsequent levy. It is submitted that if this fund was sufficient to discharge all legal taxes under the new assessment, then, by the express provision of that act, nothing more could be collected against the property, and any judgment or sale for any excess over that sum would be void *ab initio*.

It has been shown that the city tax, under the new assessment, was \$6.15, and that in that tax was embraced an item of forty-seven cents, for "interest on rolling mill bonds," which this court has already decided to be illegal and void. Deducting this item of forty-seven cents from the \$6.15, there remains \$5.68 as the total legal tax for 1874, being two cents less than the amount of appellant's funds already in the hands of the city in trust for the payment of those very taxes.

Messrs. GARNSEY & KNOX, for the appellees:

Plaintiff, to recover, as he claims, under the sixth section of the Limitation law, must show complete compliance with that statute, color of title claimed in good faith, payment of

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Opinion of the Court.

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all taxes, and possession,—the defendant, in any event, having shown outstanding title in a third party. (*Irving v. Brownell*, 11 Ill. 402; *Heacock v. Lubuke*, 107 id. 396.) He has failed to do this, for he suffered the property to be sold for taxes for 1874, his claim commencing June 14, 1872. This sale for taxes destroys the bar. *Irving v. Brownell*, 11 Ill. 402; *Holbrook v. Dickenson*, 56 id. 499; *Woodruff v. McHarry*, id. 218.

The record produced is conclusive evidence that the land was sold for taxes which he ought to have paid to make out his title. *Holbrook v. Dickenson*, 56 Ill. 499.

The ruling of this court, in effect, is, that the words "legally assessed," in the statute, do not mean "legal taxes," and that when the taxes are legally assessed,—that is, levied by the proper authorities and extended by the proper officer,—they must all be paid, to make out a valid bar under the statute. *Elston v. Kennicott*, 46 Ill. 187; *Fagan v. Rasier*, 68 id. 88; *Wettig v. Bowman*, 47 id. 17; *Allen v. Munn*, 55 id. 486.

It would be unjust that a party should take from a fee simple owner his property, and not pay taxes upon it, on the ground that they were illegal. See, also, by analogy, *Gage v. Pirtle*, 124 Ill. 504.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was an action of ejectment, brought by William Y. Grant, to recover the possession of lot 3, block 12, in Casseday's addition to Joliet. On a trial of the cause before the court without a jury, judgment was rendered against the plaintiff for costs, to reverse which he appealed.

The plaintiff claimed, on the trial, color of title and seven successive years' possession and payment of taxes. He read in evidence a deed, dated June 14, 1872, from Mary A. Kavanaugh, to himself, which purported to convey the premises. Under the deed, plaintiff immediately took possession of the lot, enclosing it with a fence, and erected a house upon it, and continued in the possession until December, 1881, when the

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Opinion of the Court.

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defendants entered into the possession of the lot. No question is made in regard to color of title and seven successive years' possession of the lot under color of title before action brought, but it is claimed that the plaintiff failed to establish seven successive years' payment of all taxes legally assessed on the property, and hence he failed to establish title under section 8 of the Limitation act of 1845. The act provides, that "every person in the actual possession of lands or tenements, under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title."

As observed before, color of title and seven years' possession, as required by the statute, was proven, and for the purpose of proving payment of taxes the plaintiff read in evidence tax receipts showing payment of taxes on the lot from 1872 to 1880, both inclusive. No question was raised in regard to the payment of any of the taxes for either of the years, except the city tax of the city of Joliet for the year 1874, and for the purpose of proving a break in the payment of all taxes assessed on the lot, the defendant offered in evidence a certified copy of the judgment, record, precept, and return of the county treasurer to the county clerk thereon, of a judgment and sale for taxes of the lot in question, for the city taxes of the city of Joliet, for the year 1874, showing that said lot was sold for taxes under a judgment rendered at the May term of the county court of Will county, 1878, for back taxes, assessed under the law entitled "An act in regard to the assessment, levy and collection of the taxes of incorporated cities in this State for years prior to the year 1877," passed and approved May 5, 1877. These records show the valuation of the lot to be \$314, and that it was assessed to William Y. Grant; that the total tax extended was \$6.15; that the credit to which said Grant was

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Opinion of the Court.

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entitled was \$5.70, and that the amount of unpaid tax was forty-five cents, and that the sale was for the sum of ninety-six cents, of which fifty-one cents were costs, sale being made to James G. Elwood.

It appears from the evidence, that in the year 1875 the city of Joliet attempted to collect its taxes for 1874 under an act of April 15, 1873, known as "Bill 300." The books were placed in the hands of the collector, and some of the tax-payers paid their taxes. Among those who paid was the plaintiff, and upon payment of the amount due he received the following receipt:

"JOLIET, ILL., March 27, 1875.

"Received of William Y. Grant, Eleven 40-100 dollars, in full for city taxes assessed as follows upon the following described property in the city of Joliet, Will county, and State of Illinois, for the year 1874, to-wit:

Description.	Sec.	Sub-lot.	Lot.	Block	Value Dollars	Total tax.
						D. C.
Casseday's Add. to Joliet			3	12	300	5 70
" " "			1	13	300	5 70
						11 40

MATHEW TOUHEY, *Collector.*"

Others contested the taxes, and the act under which the city had proceeded was held to be unconstitutional, and hence the collection of the taxes was defeated. To remedy this difficulty, the legislature, in 1877, passed an act which authorized cities to re-levy and collect back taxes which such cities had failed to collect under any unconstitutional law. (Laws of 1877, p. 56.) The second section of the act provided, that all payments which had been made under the first levy by any person or persons should be considered voluntary payments, and the party who had made payment should receive credit for the payment so made, in the new levy. That section of the act also provided, that if the amount of taxes under the new

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Opinion of the Court.

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levy should not exceed in amount the payment to be credited, then nothing should be collected; but if the taxes so extended should exceed such payment, then the excess, only, should be collected. Under this act the city of Joliet re-levied and proceeded to collect its back taxes for 1874, and among the items certified to the county clerk by the city council was one for interest on "rolling mill bonds," the *pro rata* share of which item upon the lot in question was forty-seven cents, being two cents more than the amount for which tax judgment was had. The "rolling mill bonds" were a donation made by the city of Joliet to the Union Coal, Iron and Transportation Company, to assist said company in erecting rolling mills at Joliet, and this item of forty-seven cents was actually extended upon the tax books and collected by the sale in question. In the new levy the tax against the lot in question, including the item of forty-seven cents for interest on rolling mill bonds, was \$6.15, being forty-five cents more than plaintiff had paid on the prior levy, and for which he had received a receipt in full.

In order to establish title under the section of the statute heretofore cited, the person in possession of the premises under color of title is required to pay all taxes legally assessed on the property for seven successive years. Did the plaintiff pay all taxes legally assessed on the lot for the period indicated? There is, as observed before, no dispute as to the payment of the taxes for either year claimed by the plaintiff, except for the year 1874, and if the evidence establishes a payment for that year, then the title of plaintiff was made out. The amount which plaintiff paid in the year 1874, under the act of 1877 must be regarded as a payment on the taxes, as by the terms of the act plaintiff was entitled to a credit on the new levy for the amount which he had paid, and he could not be required to pay any additional amount, unless the taxes assessed under the new levy exceeded the amount paid. It is claimed that the taxes under the new levy exceeded the amount which plaintiff had originally paid, in the sum of forty-five cents. But the

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Opinion of the Court.

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item of forty-seven cents for interest on rolling mill bonds was illegal, as the city had no power to issue bonds in aid of a private manufacturing company, and had no power to levy or collect taxes to pay either interest or principal on such bonds. *English v. The People*, 96 Ill. 566, is decisive of this question.

But while it is conceded that the item of forty-seven cents is an illegal tax, it is said, you can not dissever the portion of the tax claimed to be illegal from that portion which is admitted to have been legal, and that the application of plaintiff's payment of \$5.70 must be made on both portions of the tax,—that legal and that illegal,—in the proportion that forty-seven cents bears to \$6.15, the entire tax. It is plain, if a portion of the money plaintiff paid to the city is to be applied in discharge of the illegal tax, a small amount of legal tax would remain unpaid. But the statute, as has been observed, allowed plaintiff a credit on the new levy for the amount which he had previously paid. The money was in the hands of the city, and the city was bound to make an application of the money in payment of a legal tax. The law would not sanction the payment of the money on an illegal tax, nor could the money be appropriated to an illegal purpose.

It is also insisted that plaintiff was bound to pay all the taxes, whether legal or illegal, and as he failed to do so he did not make out a title under the statute; and in support of this view we have been referred to *Elston v. Kennicott*, 46 Ill. 190, *Wettig v. Bowman*, 47 id. 21, and *Allen v. Munn*, 55 id. 486. We do not think these cases sustain the view of counsel. In the first case no effort was made to pay any portion of the tax, while the justness of the tax was not called in question. The only objection to the legality of the tax was, that the assessment roll did not contain the dollar-mark. In the second case there was no question in regard to the legality of the assessment and the legality of the tax, but it was insisted that the party was released from the payment by an act of the legislature, passed for the relief of certain persons in the "American Bottom."

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Syllabus.

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So, too, in the *Munn case*, as said in the opinion: "The property, as appears, was taxed every year, like other property, and by a description perfectly definite, and appearing upon a recorded plat of this portion of the city, made by the town authorities."

We fully concur in the decision of each of the cases cited, but we do not think they control the question involved in this case. It must be conceded that a person, to come within the protection of the statute, must pay all taxes legally assessed on the premises. That was done in this case. The forty-five cents for which the lot was sold was a void tax, and if void it must be regarded as no tax. The plaintiff was under no obligation, legal or otherwise, to pay it, and the county authorities had no right whatever to sell the lot for the tax. The sale was void. (See *Riverside Co. v. Howell*, 113 Ill. 256.) We think the evidence introduced on the trial showed that plaintiff had paid all taxes legally assessed on the lot, for seven successive years, and as he had color of title, made in good faith, and continued in possession of the lot during the same period, he established paramount title, and was entitled to recover.

The judgment will be reversed, and the cause remanded.

*Judgment reversed.*

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JACOB KOEHLER

v.

CHRISTOPH KLEIN *et al.*

*Filed at Ottawa May 16, 1889.*

1. PARTITION—commissioners' report—*grounds of exception thereto.* A party to a proceeding for partition excepted to the commissioners' report of partition of land, on the ground that the interests of the parties were manifestly prejudiced by the partition as reported, and because the partition could not be made without manifest prejudice to the interests of the parties. No proof was introduced showing that the

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Opinion of the Court.

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party complaining, or any other party, was injured by the partition: *Held*, that the court properly overruled the exceptions to the report. If any party was injured, the party objecting should make that fact appear.

2. A ground of exception to the report of commissioners making partition was, that the map or plat referred to in the report did not show the size and dimensions of the several parcels, as indicated by the surveyor's figures thereon. The correctness of these figures was not disputed, they showing the distances of each line: *Held*, that the objection on account of the plat was frivolous and properly overruled.

APPEAL from the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. WALKER & JUDD, for the appellant.

Mr. WILLIAM VOCKE, and Mr. HARVEY STORCK, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This is a proceeding for the partition of the north ten acres of the east half of the west half of the north-east fractional quarter of section 1, township 40, north, range 13, east of the third principal meridian, in Cook county. The land belonged to Christoph Klein, deceased, in his lifetime, and he dying intestate, it descended in equal parts to his seven children, who were his heirs-at-law. Two of these children sold and conveyed their undivided interests to Jacob Koehler, and partition of the tract was therefore to be made, so as to give Christoph Klein, Catharine Keller, Barbara M. Reinstich, Sybilla Meyer and Elizabeth Buschert each one-seventh, and Jacob Koehler two-sevenths. Partition was decreed, and commissioners were appointed to make partition. They reported that they had made partition by dividing the tract by parallel lines, running north and south, into seven equal tracts, numbered from 1 to 7, consecutively, commencing on the east side, and that they assigned and set apart to Jacob Koehler lots

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Opinion of the Court.

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numbered 1 and 2, and that to each of the other five parties they assigned and set apart a lot, indicated by its number; and they accompanied their report with a plat exhibiting the partition. Jacob Koehler excepted to the report, because—First, the interests of the parties are manifestly prejudiced by the partition report; second, the premises in question can not be partitioned without manifest prejudice to the interests of the parties; third, the plat attached to said report is false and misleading, and is not such a plat as would be entitled to record; fourth, the item of \$25, surveyor's fees, should not be allowed, because the surveyor has furnished a false and erroneous plat.

In support of these exceptions, an affidavit of Jacob Koehler was filed, which shows that the premises sought to be partitioned are of a long, slender and rectangular shape, and four times as wide north and south, as broad east and west; that the only means of access to said premises is from a public road running along the north side thereof; that said premises are situated in a sparsely inhabited farming region, five miles from the city limits of the city of Chicago, and that the land is very low, and inclined to be swampy. Also the affidavit of Samuel S. Greeley, a surveyor, in support of said exceptions, which states that he has had submitted to him the plat attached to the commissioners' report; that said plat is out of proportion to the dimensions marked thereon, and gives an erroneous impression of the shape of the tracts of land to be represented by the same; he states that the map attached to his affidavit is a correctly prepared representation of a tract of land of such dimensions as are indicated by the figures upon the map attached to the report.

The map attached to Greeley's affidavit, with an addition thereto showing the location of twenty acres of other land, owned by Koehler, is as follows:

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Opinion of the Court.

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## ROAD.

47.34	47.34	47.34	47.34	47.34	47.34	47.34	47.34
7	6	5	4	3	2	1	1315.95
47.23	47.23	47.23	47.23	47.23	47.23	47.23	1315.95
47.23	47.23	47.23	47.23	47.23	47.23	47.23	47.23

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TWENTY ACRES OWNED BY JACOB KOEHLER.

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Syllabus.

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The length of the lots is  $1315\frac{45}{100}$  feet, and their width is  $47\frac{28}{100}$  feet. No other evidence was introduced in support of the exceptions. The court overruled the exceptions, and decreed that the report be confirmed. Koehler brings the case here by appeal from that decree.

The court below very properly overruled the exceptions and confirmed the report. No one testifies that Koehler is injured by this partition—not even himself. It is obvious that it is made so as to best subserve his interests, throwing his land,—that is, the two lots and the twenty acres,—all together, so that he can hereafter use it as a single tract, or subdivide it to suit his fancy. No one testified that the interests of the parties are injured by this partition, and we are not authorized, in the absence of evidence in that respect, to determine there was injury.

The objection on account of the form of the plat accompanying the report, is frivolous. The distances are correctly given, and it is therefore impossible that any one can be misled by the plat.

The decree is affirmed.

*Decree affirmed.*

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JAMES S. McFARLAND

v.

ABRAM CLAYPOOL.

*Filed at Ottawa May 16, 1889.*

128	397
54a	297
128	397
67a	579
128	397
93a	*245
128	397
100a	*634
128	397
207	*530

1. **PLEA IN ABATEMENT—*in attachment—requisites of the plea.*** An affidavit for an attachment set out as grounds therefor, that the defendant "conceals himself or stands in defiance of an officer, so that process can not be served upon him, and has, within two years last past, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder and delay his creditors, and has, within two years last past, fraudulently concealed or disposed of his property so as to hinder and delay his creditors, and is about fraudulently to conceal, assign or

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Brief for the Plaintiff in Error.

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otherwise dispose of his property or effects, so as to hinder or delay his creditors." The defendant pleaded in abatement "that he did not conceal himself and did not stand in defiance of an officer, so that process could not be served upon him; that he has not, within two years last past, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder and delay his creditors; has not, within two years last past, fraudulently concealed or disposed of his property so as to hinder and delay his creditors, and was not about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors;" *Held*, on demurrer to the plea, that it was bad, in failing to deny that the debtor had, within two years before the commencement of the suit, fraudulently disposed of his property.

2. EXCEPTION—*when necessary to be taken*. On application of a defendant for leave to file an amended plea in abatement to a writ of attachment, the court remarked that no action would be taken granting leave until affidavit was filed, showing, etc. No exception was taken: *Held*, that if the remark of the court was to be taken as a denial of the motion, the ruling could not be assigned for error, for want of an exception.

3. PRACTICE—*asking leave to file an amended pleading*. A party who desires to file an amended pleading should prepare it, and submit it to the inspection of the court. He is not entitled, as of right, to an order giving him leave in advance to file it before it has even been drafted. There is, therefore, no error in refusing defendant's motion for leave to file an amended plea in abatement to an attachment, when the proposed plea is not prepared and submitted for inspection.

4. SAME—*waiver as to judgment on demurrer*. Where a demurrer is sustained to a defendant's plea in abatement to a writ of attachment, and the defendant appears and asks leave to file an amended plea, it is questionable if he does not thereby waive his right to complain of the judgment upon the demurrer.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. JAMES FRAKE, for the plaintiff in error:

The demurrer to the plea should have been overruled. The plea traversed the affidavit by negativing all the allegations in the affidavit relative to defendant, James S. McFarland. It denied the allegations in the affidavit, using the language

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Brief for the Plaintiff in Error.

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used in the affidavit, and tendered an issue. *Miller v. Blow*, 68 Ill. 304.

A plea denying the causes for attachment must be understood to refer to the time of the commencement of the suit by filing an affidavit. In this case the sustaining of a demurrer to the plea for lack of exact technical accuracy, and a refusal of leave to amend the plea, amounts to a denial of justice.

The plea was not a dilatory plea, and not subject to the rules governing such pleas. The court erred in not permitting defendant, J. S. McFarland, to file amended pleas to the affidavit. *Safford v. Insurance Co.* 88 Ill. 296; *Railway Co. v. McDermid*, 91 id. 170; *Humphrey v. Phillips*, 57 id. 132.

The defense set up by the plea in this case must be held to be of a substantial and meritorious character, equally with a plea to the jurisdiction. *Hawkins v. Albright*, 70 Ill. 88.

Granting leave to amend is not discretionary with the court, but a legal right, and when proper application is made for leave to amend a plea on sustaining demurrer thereto, the court can only, in granting it, impose such terms as are just and reasonable, having reference to existing rules of practice. *Insurance Co. v. Trust Co.* 1 Bradw. 391, citing *Drake v. Drake, supra*, *McCormick v. Wells*, 83 Ill. 240, and *Hays v. Loomis*, 84 id. 18.

The court required the defendant, J. S. McFarland, to file an affidavit showing that he would be injured if not allowed to plead. This requirement was complied with, but the court then denied leave to amend. The court had no right to insist upon any affidavit.

By section 28 of the Attachment act, the plaintiff has the right to amend his affidavit for any insufficiency. The rights of the defendant are just as sacred, and for any insufficiency of his plea the right to amend is given him by section 23 of the Practice act.

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Brief for the Defendant in Error. Opinion of the Court.

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Messrs. CRATTY BROS. & ASHCRAFT, for the defendant in error:

When the court sustained a demurrer to the plea, the defendant took no exception, but immediately moved for leave to amend. He asked a favor of the court, and undertook to show a meritorious right to file a new plea. By that course he waived any further right to insist upon the sufficiency of the former plea, or question the action of the court in sustaining the demurrer. *McKichan v. Follett*, 87 Ill. 103.

The court had the right to have a plea produced for inspection, to see whether it be a better plea than the old one, and save further demurring and delay. The court would clearly have the reasonable right to protect itself and the parties to that extent. No plea in fact was presented, and that omission alone was reason enough to justify a denial of the motion. But, as the court stated, no action whatever was taken at that time, and whatever was done seemed to be satisfactory to counsel, for he took no exception to the remark.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a suit in attachment, brought by Abram Claypool against James S. McFarland and I. B. McFarland, to recover the amount of four checks drawn by the defendants upon the Union Stock Yards National Bank, payable to the plaintiff or order, and payment of which had been refused by the bank on presentation. The affidavit in attachment, which was sworn to and filed January 8, 1887, stated as grounds for attachment, the non-residence of defendant I. B. McFarland, "and that he, the said James S. McFarland, conceals himself or stands in defiance of an officer, so that process can not be served upon him, and has within two years last past fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder and delay his creditors, and has, within two years last past, fraudulently concealed or disposed of his property so as to hinder and delay his creditors, and is about fraudu-

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Opinion of the Court.

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lently to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors."

A plea on behalf of James S. McFarland was sworn to by him February 4, 1887, and filed February 8, 1887, the allegations of which were in the following language: "That he did not conceal himself and did not stand in defiance of an officer so that process could not be served upon him; that he has not within two years last past fraudulently conveyed or assigned his effects or a part thereof so as to hinder and delay his creditors; has not within two years last past fraudulently concealed or disposed of his property so as to hinder and delay his creditors, and was not about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors."

To this plea a special demurrer was filed, pointing out as a ground of demurrer, among other things, that it did not appear from the plea that the defendant had not, within the two years last preceding the filing of the affidavit, fraudulently conveyed or assigned his effects or a part thereof so as to hinder and delay his creditors, and had not within the two years then last past fraudulently concealed or disposed of his property so as to hinder and delay his creditors. Said demurrer was sustained, and the judgment of the court sustaining it is assigned for error.

The defendant, instead of electing to abide by his plea, appeared by his counsel and asked leave to file an amended plea, and it is questionable whether he did not thereby waive his right to complain of the judgment of the court upon the demurrer. But whether that is so or not, it is too manifest to admit of argument, that the plea was fatally defective. Its averments were in the present tense, and can therefore be held to apply only to the two years next preceding the day on which it was filed, or at most to the two years next preceding the day on which it was sworn to by the defendant. There remained a portion of the two years covered by the attachment

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Opinion of the Court.

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affidavit to which the plea did not apply, and for that reason it was not a complete traverse of the affidavit. Both the plea and affidavit might be true.

The defendant has also assigned for error the decision of the court in relation to permitting an amended plea to be filed. It appears from the bill of exceptions, that at the time the order of the court sustaining the demurrer was entered, the defendant's counsel "moved the court for leave to said defendant to file an amended plea in abatement of the writ of attachment issued in this cause, and the court thereupon stated that no action would be taken granting leave to file such amended plea until an affidavit was filed showing that said defendant would be injured by not being allowed to file an amended plea in abatement." Whether the remark of the court here recorded is to be regarded as an adverse decision of the defendant's motion to amend, or as a refusal to take any action on the motion until an affidavit should be filed, it can not now be assigned for error, as it does not appear to have been excepted to.

On the following day the defendant's counsel again appeared, and in support of his motion to file an amended plea, read his own affidavit showing that he had been taken by surprise by the filing of the demurrer and the decision of the court thereon, and that his client had gone temporarily to the State of Colorado on business and therefore could not make the affidavit in person. Said affidavit also stated on information and belief various facts which had been communicated to said counsel by his client, which tended to show that the attachment affidavit was untrue. So far as the record shows, however, no amended plea was either prepared, presented or offered to be filed. The motion for leave to file an amended plea was thereupon overruled, and an exception to said decision was duly preserved.

The record does not specify the ground upon which the motion was overruled, and therefore if any tenable ground

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Opinion of the Court.

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existed, the decision of the court must be sustained. As no amended plea was presented or offered to be filed, we may assume that the motion was overruled on that ground. A party who desires to file an amended pleading should prepare it and submit it to the inspection of the court. He is not entitled as of right to an order giving him leave in advance to file it before it has even been drafted. No presumption can be indulged in that the plea when presented would be a good one, and its sufficiency in substance can be made to appear only by bringing it into court for examination. Even then, if found to be substantially defective, it would not be error to refuse to allow it to be filed, and such refusal certainly can not be error where the pleading has not been presented at all, and there are no means of determining whether it is sufficient in substance or not. As the defendant's motion for leave to file an amended plea was unaccompanied by any draft of the plea sought to be filed, and as no copy of such proposed plea is preserved in the record, we are unable to say that the motion was not properly overruled.

It should be observed that in this case there was no application to the court for time to prepare the plea, but the defendant's counsel was content to submit his motion upon his affidavit alone, without any presentation of the amended plea itself, or any prayer for time to prepare one, and as he did not therefore place himself in a position where he was entitled to a favorable decision of his motion, he can not now be heard to complain that the decision was against him.

After the denial of the defendant's motion, a trial was had before the court without a jury on the plea of non-assumpsit, said trial resulting in a finding and judgment in favor of the plaintiff for \$2052. This judgment was taken to the Appellate Court by writ of error and there affirmed. As we find no error in the record, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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Syllabus. Brief for the Appellant.

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128 404  
112a 1419

JOHN E. HANKS

v.

LAURA B. RHOADS *et al.*

Filed at Springfield May 14, 1889.

1. CROSS-EXAMINATION. Where a witness is asked, on cross-examination, about a matter not testified to by him on his direct examination, the question will be obnoxious to an objection as not being proper cross-examination.

2. CHANCERY—*sufficiency of evidence to support decree.* Where there is sufficient evidence to justify the decree rendered, the decree will not be reversed on the ground the evidence is conflicting and contradictory, especially when the chancellor has heard the witnesses testify, so that he could judge from their appearance on the stand, and when the defendant's evidence differs in theory from the defense made in the answer.

APPEAL from the Circuit Court of Edgar county; the Hon. JAMES F. HUGHES, Judge, presiding.

Mr. H. S. TANNER, for the appellant:

Prior to the September term, 1878, of the Edgar circuit court, appellant had become surety for said W. W. Hanks on a replevin bond in the penal sum of \$10,000. This deed, appellees, by their bill, ask to have declared a mortgage to secure appellant as such surety, and to pay any indebtedness of W. W. Hanks to appellant. We think the evidence wholly insufficient to show that the deed was intended as a mortgage. Whether the conveyance amounted to a mortgage depends upon the intention of the parties at the time. *Pitts v. Cable*, 44 Ill. 102; *Price v. Karnes*, 59 id. 276.

The positive evidence of the warranty deed, absolute upon its face, and the witnesses Michael Hanks, John McCord, Abner Dill, Thomas Slemons, James Cale, Samuel Hybarger and Forrest Hanks, is surely sufficient to overcome any doubt raised by the uncertain and contradictory evidence given for

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Opinion of the Court.

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appellees. To convert the deed in this case into a mortgage, the evidence should show clearly such was the contract and intent of the parties at the time of making the deed. It must have been a mortgage from the beginning. *Sweetland v. Sweetland*, 3 Mich. 482.

Not one of appellees' witnesses claims to know anything about the contract between William W. Hanks and appellant when the deed was delivered. Their evidence is confined to conversations with appellant after the whole transaction was concluded. *Pitts v. Cable*, 44 Ill. 102; *Price v. Karnes*, 59 id. 276; *Remington v. Campbell*, 60 id. 516; *Hancock v. Harper*, 86 id. 445.

Mr. JAMES A. EADS, and Mr. H. VAN SELLAR, for the appellees.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

This is a bill in chancery, by appellees, against appellant, by which it is sought to have a deed declared a mortgage, and for an accounting, for rents, payment of taxes, etc. The bill alleges that William Hanks, the father of appellees, to secure appellant as surety on a replevin bond executed by William, did, on the 18th day of April, 1879, convey to said appellant, in fee simple, one hundred and sixty acres of land in Edgar county, Illinois; that no liability accrued to said appellant as such surety, and that he suffered no loss thereby, but that he has since refused to reconvey said premises, claiming that said deed was intended by the parties to be absolute. Appellant, by his answer, denies that said conveyance was made merely to indemnify him on account of said suretyship, and he avers, "that said William W. Hanks, at the time of said conveyance, was indebted to defendant between \$5000 and \$6000, for money at different times before then advanced by defendant to said William W. Hanks; that said William W. Hanks was financially embarrassed, and defendant, at various times, advanced him large sums of money, and that just be-

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Opinion of the Court.

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fore the making of said conveyance, he and said William W. Hanks had an accounting, in which it was shown that defendant had loaned said William W. Hanks considerably more than \$5000, without counting any interest, and said William W. Hanks proposed to convey to said defendant said tracts of land in said bill mentioned, in liquidation of his indebtedness." On the hearing, the witnesses were produced, and testified in open court, and a decree was rendered in favor of complainants, declaring the conveyance to be in the nature of a mortgage, as alleged in the bill, and ordering a statement of account between the parties. From that decree this appeal is prosecuted, and a reversal insisted upon, mainly on the ground that the evidence is insufficient to sustain the finding and decree of the trial court.

The evidence is irreconcilably conflicting, and by no means satisfactory. A number of witnesses introduced on behalf of appellees testify to admissions and declarations by appellant, to the effect that the deed in question was made for the purpose alleged in the bill, and not intended by the parties as an absolute conveyance, and their evidence, uncontradicted, justifies the finding and decree. On the other hand, witnesses introduced by appellant swear to declarations made by William in his lifetime, to the effect that he had sold the lands to appellant, and which tend to disprove the theory of the bill and establish the defence. But one witness testifies to being present when the deed was made. Thomas Slemmons swears that appellant told him, before he bought the land, he was going to do so, and says: "I went with him when the trade was made,—when the papers were drawn up. Berry (meaning appellant) paid him some money. They talked about papers, and Berry counted him down some money,—between \$1500 and \$2000." He also states that they talked about what had been done before that; that Berry had paid off some judgments and some costs, some lawyers fees, and other charges; that they were figuring on items that Berry had made as pay-

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Opinion of the Court.

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ments on the place; but he seems to be quite positive that a considerable sum of money was paid down by appellant at that time, and he says the deed was then made. This he thinks was about the middle of April, 1879. Forrest Hanks, a son of appellant, testified to a conversation between his father and William about this land. He swears that he heard his father say he had paid him \$4000, and would pay him \$2360 if he would deed him the place, and let him have two years rent if he would pay the mortgage. This conversation he says was in 1879.

This testimony, especially that of Slemmons, while it tends to prove an absolute purchase of the land in question, is in conflict with the theory of the defence set up, which is in the answer, that the conveyance was in satisfaction of a past indebtedness, and not on account of anything paid at the time. Slemmons' evidence is, that the deed was executed and acknowledged after night, but the deed itself shows that it was filed for record at four o'clock P. M. the same day it was made. It can not be said that there is not evidence in this record sufficient to support the decree, nor that it is so completely overcome by the evidence of appellant as to justify a court of review in setting aside the finding of the chancellor, more particularly when the record shows that he had the opportunity of seeing the witnesses and hearing them testify.

James Hanks, a witness for appellees, was asked, on cross-examination, if William did not tell him that he had sold the land in question to Berry, and the court sustained an objection thereto, evidently on the ground that it was not proper cross-examination. We think the ruling was correct. There was nothing in the evidence of the witness in chief to justify that question.

The decree must be affirmed.

*Decree affirmed.*

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Syllabus.

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PRESCOTT G. HALE

v.

AMOS W. CRAVENER.

*Filed at Ottawa May 16, 1889.*

1. **VENDOR AND PURCHASER—*of the right of rescission—conditions upon which it rests.*** Where one has obligated himself to convey to another a fee simple title to a tract of land by a warranty deed, before the vendor can rescind the contract for non-payment of the purchase money, he must not only tender to the purchaser a proper deed, but must also be able to convey a marketable title,—that is, a title not subject to such reasonable doubt as would create a just apprehension, or one that persons of reasonable prudence and intelligence would be willing to take and pay the fair value of the land.

2. A person holding land in trust under a will, made a contract for its sale, agreeing to make a warranty deed conveying the title in fee, and to furnish an abstract showing title and his power to sell and convey, tendered his deed after the filing of a bill by the heirs of his testator to set aside the will, and on refusal of the vendee to accept the deed and perform his part of the contract, the vendor filed his bill to rescind the sale. It was held, that as the vendor was not able to convey such a title as would satisfy the covenants of his agreement, he could not put the purchaser in default by the tender, and demanding performance before the termination of the suit to contest the will, which was his authority to convey. In such case, no prudent man would accept the deed subject to the doubt and uncertainty cast upon his right to convey by the filing of the bill to set aside the will.

3. A contract for the sale and conveyance of land provided that the vendor, on or before a day named, should make and deliver to the purchaser an abstract showing title and the right to convey, and that if the abstract failed to show a good title, then the cash payment which had been made should be returned to the purchaser and the contract determined: Held, that the clause relating to the rescission of the contract if the abstract did not show a good title, was for the benefit of the purchaser, and that the vendor could not take advantage of it to rescind the contract.

4. A party who seeks to determine his contract by availing himself of a condition therein contained providing for such determination, must bring himself strictly within the terms of such condition. Such a condition is not to be construed liberally, nor enlarged to include facts or circumstances not within its terms, but on the contrary, is, in

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Syllabus.

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contracts for the sale of land, to be taken most strongly against the vendor.

5. A vendor can not make use of a condition to rescind his contract for the purpose of getting rid of a duty which attaches to him upon the rest of the contract.

6. A trustee under a will made a contract for the sale of a tract of land, and \$500 was paid down. The vendor was, by a given time, to furnish the purchaser with an abstract showing title and his right to convey, and if he failed to show a good title, then the \$500 was to be returned and the contract to terminate. Independently of this, the vendor covenanted that on performance by the purchaser he was to convey and assure to the latter a fee simple title. The vendor furnished an abstract, which on its face showed a good title and right to convey, but in fact there was a bill then pending, filed by the heirs of the testator, to set aside the will, not shown in the abstract: *Held*, that the vendor had not brought himself within the terms of the condition, although his abstract did not show any defect in his title, and that he could not rely on facts outside of the abstract as a ground of rescission, and further, that he was bound to convey by his covenant to that effect.

7. As a general rule, a contract can not be determined or rescinded by a party to it for non-performance of the other party, unless the former is in a position to demand a specific performance.

8. *SAME—waiver of prior performance.* Under a contract for the sale of land, the purchaser was to pay down \$500, which was done. The vendor was then, by a certain time, to furnish the vendee an abstract showing a good title and power to convey such a title, and in ten days thereafter the purchaser was to pay \$3500, and execute notes for the balance of the price, secured by mortgage, when the vendor obligated himself to convey the title in fee simple. It was also provided, that if the abstract, when furnished, failed to show such title, the \$500 was to be returned and the contract to be determined. The abstract was furnished, showing a good title, but failed to show the pendency of a bill to set aside a will, under which the vendor claimed authority to sell and convey: *Held*, that each party was bound to perform in the order stated,—that the doing of the preceding act required the performance of the succeeding act by the other, and that one party might waive the doing of the preceding act by the other, and proceed to the performance of the succeeding act.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. EGBERT JAMIESON, Judge, presiding.

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Statement of the case.

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This was a bill in equity, exhibited in the Superior Court of Cook county, by Prescott G. Hale, against Amos W. Cravener, to cancel and set aside as a cloud upon title a certain contract for the sale and conveyance of real estate. The Superior Court decreed in conformity with the prayer of the bill, but that decree was reversed on appeal to the Appellate Court for the First District, and the bill dismissed. The case is in this court by appeal from that judgment. A sufficient statement of the facts and points in issue will be found in the opinion of Mr. Justice MORAN, of the Appellate Court, which is as follows:

MORAN, P. J.: "On December 24, 1886, a contract in writing was entered into between appellant and appellee, as follows:

"'Articles of agreement made this 24th day of December, A. D. 1886, between Amos W. Cravener, party of the first part, and Prescott G. Hale, as trustee under the last will and testament of Matilda Hale, deceased, party of the second part:

"'Witnesseth, that if the party of the first part shall first make the payment and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the second part covenants and agrees, at the time hereinafter stated, to convey and assure to the said party of the first part, in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed, the lot, piece or parcel of ground situate in the county of Cook, and State of Illinois, known and described as the north one-half ( $\frac{1}{2}$ ) of the north-west one-quarter ( $\frac{1}{4}$ ) of section twenty-three (23), township thirty-eight (38) north, range thirteen (13), east of the third principal meridian, except the east fifty (50) feet thereof, heretofore taken for a railroad right of way, and subject also to all streets, alleys and highways, and subject also to all taxes, assessments or other impositions legally levied or imposed upon said land subsequent to the year A. D. 1886. And said second party also agrees to furnish to said party, on or before January 10, 1887, (or as soon thereafter as the probate proceedings in the estate

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Statement of the case.

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of Matilda Hale, deceased, can be finally settled, and the abstract of title continued to show such settlement,) an abstract of title showing good title and power and authority to sell and convey in said second party as trustee, as aforesaid. And the said party of the first part hereby covenants and agrees to pay to the said party of the second part the sum of \$24,000 in the manner following, to-wit: \$500 cash down upon the signing of this agreement, and within ten days after said second party shall have furnished to said first party said abstract of title as above provided, said first party shall pay to said second party the further sum of \$3500, and will make and deliver to him his four promissory notes, dated January 1, 1887, payable to the order of said second party at the Merchants' Loan and Trust Co., Chicago, Illinois,—one for \$3000, payable April 1, 1887, one for \$5000, payable one year after date, one for \$6000, payable two years after date, and one for \$6000, payable three years after date,—all with interest from date, at the rate of six per cent per annum, payable semi-annually, and at the same time will make, execute and deliver to said second party a mortgage on the premises above described, securing said four above mentioned promissory notes, and at the same time the said second party (the first party having performed his contract) will execute and deliver to said first party the warranty deed aforesaid. In case the abstract of title to be furnished as aforesaid, does not show a good title as herein stated, then the five hundred dollars (\$500) this date paid hereon shall be returned to said first party and this contract determined.

"In case of a failure of said first party to make either of the payments or to perform any of the covenants on his part made and entered into hereby, then this contract shall, at the option of said second party, be forfeited and determined, and said second party shall retain all payments made, as his agreed and liquidated damages. It is hereby agreed that all the covenants and agreements herein contained shall extend to and be

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Statement of the case.

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obligatory upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

"In witness whereof said parties have hereunto set their hands and seals the day and year first above written.

AMOS W. CRAVENER, (seal.)

PREScott G. HALE, (seal.)

Trustee under last will and testament of Matilda Hale, dec'd.'

"After the making of said contract, appellee proceeded to close up the proceedings in the probate court, and on or about January 6, 1887, his final account was approved by said court, and appellee was discharged as executor, and the estate closed. The abstract of the land mentioned in the contract was extended by appellee so as to show the final settlement of the estate, and delivered on January 14, 1887, and as soon as it was completed by the abstract makers, to the agent of appellant.

"On January 8, 1887, Martin C. Hale, Douglass R. Hale and Franklin M. Hale, three of the children and heirs-at-law of said Matilda Hale, deceased, filed their bill in chancery, in the circuit court of Cook county, against appellee and other heirs, alleging, among other things, that the said last will of said Matilda Hale, deceased, was not the last will of said deceased, and praying, among other things, that the same might be set aside. The abstract which was delivered to appellant by appellee on January 14, 1887, did not show the commencement of said suit in chancery, though it did show that the same parties who filed said bill, objected, on January 6, 1887, in the probate court, to the discharge of appellee as executor, on the ground, as they alleged, that said will was not the last will of said Matilda Hale. The abstract furnished to appellant was submitted by him to his solicitor for examination, and on January 20, 1887, said solicitor sent to appellant the following opinion of title:

"I have given the abstract of title to the land N.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$ , sec. 23, T. 38, 13, in Cook county, Illinois, a careful examination. It is my opinion that the title stood at death of Ma-

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Statement of the case.

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tilda Hale in her, and that she had good right to convey the same, or to devise the same by will; that under the will, if the same is in all respects valid, Prescott G. Hale, as her trustee, has full right to sell and convey the same, and that a deed from said Prescott G. Hale and her other heirs (none being under disability) will give a good title in any event.

Yours,

H. T. HELM.'

"Neither Cravener nor his solicitor knew of the filing of the bill attacking the will till after the date of said opinion. Some negotiations took place between the parties with reference to some arrangement by which the chancery suit might be disposed of and the title passed, but nothing was accomplished, and on March 9, Cravener filed a petition to be made a party defendant in said suit in the circuit court, and set out in his petition a copy of his contract for the purchase of the land in controversy, and an order was made by the court, making said Cravener a co-defendant, with leave to answer.

"Cravener did not make the payment of money required by the contract to be made within ten days of the delivery to him of the abstract, and did not make and deliver the promissory notes or mortgage provided for in the contract. About May 7, 1887, Hale was offered \$28,500 for the property in controversy, and through his attorney answered that he could not sell till he had gotten rid of the contract with Cravener, which he proposed to do. On May 27, 1887, Hale tendered to Cravener a deed of the premises described in the contract, and which was in form according to the contract, and demanded that Cravener should pay the money then due under the contract, and should execute and deliver the notes and mortgage according to the terms of the contract; but appellant refused to accept said deed and to make the payments or execute the notes, whereupon appellee tendered to appellant \$512.75,—being the \$500 which appellant paid on the contract, with interest thereon from December 24, 1886, when it was paid;

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Statement of the case.

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but appellant refused to receive said tender or to accept said money, and thereupon appellee declared the said contract determined, and demanded from appellant the abstract of title. The next day appellant went to the office of appellee's solicitor, and there tendered to appellee the money due under the contract, and offered to receive the deed and execute the mortgage and notes, provided appellee would procure said chancery suit to be dismissed; but appellee declined, for the reason that he could not get the suit dismissed without the payment of a large amount of money.

"On June 4, 1887, the bill in this suit was filed, showing that appellant refused to discharge said contract, and that by his filing a copy thereof in said suit in the circuit court it had become a cloud on the title of appellee, and that appellant claims a conveyance of said premises, but insists that said chancery suit should be settled or caused by appellee to be dismissed, and praying that said contract be declared null and void, and be removed as a cloud on appellee's title, and be ordered delivered up and canceled. On the hearing, the facts above set out appeared from the pleadings and proofs of the respective parties, and upon said facts the court entered a decree granting the relief prayed for in appellee's bill.

"The correctness of the decree depends upon the question whether, under the terms of the contract and the facts stated, appellee had a legal right to rescind the contract and tender back the deposit paid by appellant. The terms of the contract obligated appellee to convey and assure to appellant a fee simple title to the premises described, and, to discharge such obligation, appellee was bound to convey a marketable title,—that is, a title not subject to such reasonable doubt as would create a just apprehension—one that would be regarded as merchantable, so that persons of reasonable prudence and intelligence would be willing to take it, and pay the fair value of the land. *Parker v. Porter*, 11 Bradw. 602; *Brown v. Cannon*, 5 Gilm. 174; *Snyder et al. v. Spaulding*, 57 Ill. 480.

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Statement of the case.

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"It is very plain that the title to the land mentioned in the contract was not in the merchantable condition at the time appellee tendered the deed to appellant and demanded the performance of the contract, and appellee, not being able to convey such a title as would satisfy the covenants in his agreement, could not put appellant in default by tendering the deed and demanding performance of the contract. Appellant had not agreed to accept such a title as was offered to him, and no prudent man would do so while subject to the uncertainty cast upon it by the filing of the bill. Indeed, it is frankly admitted by counsel for appellee, in his brief filed in this court, that appellant could not be compelled to accept any other than a good title, and he states that appellee has never insisted that appellant was bound to accept the title, in view of the litigation that was developed after the contract was made. If appellant was not put in default by the tender of the deed, then appellee had no right to rescind the contract on the ground that appellant refused to perform it.

"It is contended by appellee that the conditions in the contract authorized him to rescind if the title was not found good. The condition is, 'In case the abstract of title to be furnished as aforesaid does not show a good title, as herein stated, then the \$500 this date paid thereon shall be returned to said first party, and this contract determined.' Now, it is obvious that any party who seeks to determine his contract by availing himself of a condition therein contained providing for such determination, must bring himself strictly within the terms of such condition. The condition is not to be liberally construed, nor enlarged to include facts or circumstances not within its terms, but, on the contrary, is, in contracts for the sale of lands, to be taken most strongly against the vendor.

"In *Greaves v. Wilson*, 25 Beav. 290, which was a bill for specific performance in a case in which the vendor sought to determine a contract under a condition contained in it, the court said: 'The mode in which these conditions must be con-

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Statement of the case.

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strued is explained in all the cases upon the subject. They must be construed, like every other instrument, most strictly against the person who frames them, because the vendor alone can be the sole judge of the necessity or propriety of making such conditions before he offers the property for sale. In addition to that, it is to be borne in mind that a person who offers property for sale becomes subject to certain duties, in the character of vendor, and that he does not get rid of them by special conditions of sale.' It is further said in the same case, 'that a vendor can not make use of a condition to rescind a contract, for the purpose of getting rid of the duty which attaches to him upon the rest of the contract, of making out a title.' And to this effect is *Page v. Adams*, 4 Beav. 269.

"In *In re Jackson*, 14 L. R. (Ch. Div.) 851, the rule laid down in *Greaves v. Wilson, supra*, was followed in a case where the condition provided, among other things, that objections should be made within fourteen days from the delivery of the abstract, and if none were made within the time, the title was to be deemed accepted, and if the purchaser should insist on any objection which the vendor should be unable, or, on the ground of expense, should decline to remove, then the vendor should be at liberty to rescind the contract by notice, unless the purchaser should, by notice, withdraw the objection, and upon rescission the purchaser should receive back his deposit. The abstract delivered did not show the real state of the title, and after the title as shown by the abstract was approved, it was discovered that there was an equitable mortgage on the leasehold, of which the vendor was ignorant. The purchaser insisted that this should be discharged, and the vendor gave notice that he was unable and unwilling, on the ground of expense, to comply, and that he would rescind the contract unless the objection was withdrawn. The purchaser refused to admit the rescission, and applied to the court, and it was held that there could be no rescission, as the objection did not come within the condition, not having been shown by the

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Statement of the case.

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abstract, and that the charge upon the property should be cleared off by the vendor. See, also, *Roberts v. Wyatt*, 2 Taunt. 268, where a condition in a contract of sale by which the contract was to be void in case the vendor could not deduce a good title, is construed by Lord MANSFIELD to give an option, not to the vendor, but to the purchaser, to avoid the contract for failure to deduce such good title.

"Now, in view of this rule of strict construction as against the vendor, as illustrated by these cases, has appellee brought himself within the condition which he seeks to avail himself of to rescind this contract? He agreed to furnish to appellant an abstract of title showing good title, and power and authority to sell and convey, in himself, and provided a condition that in case the abstract of title to be furnished did not show a good title, the deposit should be returned, and the contract determined. The abstract which he furnished showed a good title, therefore it is clear that if nothing further had arisen to affect the title, appellee would have no right to rescind the contract under the condition. Facts existed, not shown on the abstract furnished by appellee, which render the title not good; but the existence of such facts can not avail appellee as a basis of rescission, for the condition only authorizes rescission 'in case the abstract to be furnished as aforesaid does not show a good title.' It will not do to suggest that the abstract, if perfect when delivered to appellant, would have failed to show the title good. Appellee took upon himself the duty of furnishing the abstract, and he furnished the one delivered, as a compliance with his undertaking, and he can not allege his own error or default in order to bring himself within the condition and accomplish a rescission.

"This case is not like the cases of *Hoyt v. Tuxbury et al.* 70 Ill. 332, and *Brizzolara et al. v. Mosher et al.* 71 id. 41, cited and relied on by counsel for appellee. In the first of those cases the provision was, that payments were to be made in a certain time 'after the title had been examined and found good.' In

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Brief for the Appellant.

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the second case the clause in the agreement was, 'should the title to the property not prove good, then the payment to be refunded.' So in *Manson v. Fletcher*, L. R. (10 Eq.) 212, the condition was very broad, being, in effect, if any objection to the title be persisted in, the vendor shall be at liberty to rescind the contract on returning to the purchaser his deposit. The difference between the conditions and provisions of the contracts in those cases, and that in the case under consideration, is too obvious to require specification. Such cases establish no rule for the construction of this condition.

"Our conclusion is, that appellee could not rescind the contract under its terms, as he did not bring himself within the condition authorizing a rescission, and he could not rescind for non-performance by the appellant, because appellee was not himself in a condition to perform. As a general thing, a contract can not be determined or rescinded by a party to it unless he is in a position to demand a specific performance. *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Howe v. Hutchison*, 105 id. 501; *Johnson v. Pollock*, 58 id. 181.

"The decree of the court annulling the contract and directing its cancellation can not be sustained, and the same will be reversed, with directions to the Superior Court to dismiss appellee's bill."

Mr. JAMES S. MURRAY, for the appellant:

The title is conceded to be good if the will is valid. Can the appellee hold the contract in abeyance until this litigation concerning the will is determined? We contend that he has no such right under the contract, and that upon the declaration of the appellee not to accept the title, then the appellant had a right to refund the \$500 and declare the contract determined.

The appellant has never insisted that appellee was bound to accept the title, in view of litigation that was developed after the contract was made. Nor has he attempted to forfeit

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Brief for the Appellee.

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anything. He merely claims what the contract clearly provided,—that if the title was not found to be good, neither party should be embarrassed, but that each should be placed *in statu quo*. This intention is most clearly and positively expressed. The provision is: "In case the abstract of title to be furnished as aforesaid does not show a good title, as herein stated, then the five hundred dollars (\$500) this date paid thereon, shall be returned to said first party, and this contract determined." *Brizzolara v. Mosher*, 71 Ill. 41; *Hoyt v. Tuxbury*, 70 id. 332; Fry on Specific Performance, sec. 732; *Fitch v. Willard*, 73 Ill. 107; *Greaves v. Wilson*, 25 Beav. 290; *Mawson v. Fletcher*, L. R. (10 Eq.) 212.

Messrs. H. T. & L. HELM, for the appellee:

Under a contract calling for a "good title," the vendee is entitled to a marketable title. *Parker v. Porter*, 11 Bradw. 602; *Brown v. Cannon*, 5 Gilm. 174; *Snyder v. Spaulding*, 57 Ill. 480; 1 Sugden on Vendors, (8th Am. ed.) 336.

The vendee is not bound to accept a deed and rely on the covenants of warranty. His bond calls for the title, not covenants. *Thompson v. Shoemaker*, 68 Ill. 256; *Tyler v. Young*, 2 Scam. 444; 22 Ill. 127; 26 id. 396; *Baker v. Bishop Hill Colony*, 45 id. 264; *Vining v. Leeman*, id. 248; *Johnson v. Pollock*, 58 id. 181; 58 id. 182; *Eames v. Germania Turnverein*, 8 Bradw. 672; *Denby v. Graff*, 10 id. 195.

The furnishing the vendee with a truthful abstract of title was a condition precedent. *Howe v. Hutchinson*, 105 Ill. 501.

The vendor can not claim a forfeiture unless he is in a position to demand a specific performance. Such is the express statement of many adjudications. *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Vining v. Leeman*, id. 248; *Wallace v. McLaughlin*, 57 id. 53; *Johnson v. Pollock*, 58 id. 182; *Brown v. Cannon*, 5 Gilm. 174; *Snyder v. Spaulding*, 57 Ill. 486; *Howe v. Hutchinson*, 105 id. 501.

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Opinion of the Court.

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The demand made by appellant upon appellee, on the 27th of May, goes for naught; and appellee was under no obligation to make tender or offer of payment until the vendor was in condition to give a good title. *Denby v. Graff*, 10 Bradw. 195, and cases cited.

This contract is to be construed most strongly against the vendor. The vendor expressly agreed to convey the land, and to furnish the vendee with an abstract showing a good title. He shall not be allowed to say, because he has failed to keep either of these covenants, that this fact gives him the right to say the contract has no binding force. It could not have been intended that this contract was only to bind the vendee. There should be some mutuality in its provisions. This clause should not be regarded as an open link, which the vendor could use at his pleasure to annul the binding force of his agreements, whenever, from choice or necessity, he should find himself in default. It shall not be said that when a party agrees to do a certain thing, and in case of default or failure the contract shall have no binding force, such obligor can release himself from the binding force of his own obligation by simply failing to perform his agreement. *Mason v. Caldwell*, 5 Gilm. 196; *Chrismen v. Miller*, 21 Ill. 235; *Howe v. Hutchison*, 105 id. 504; *Canfield v. Westcott*, 5 Cow. 207.

This clause was inserted for the peculiar benefit of the vendee, and not for the purpose of enabling the vendor to release himself, and this case is clearly distinguishable from *Brizzolara v. Mosher*, 71 Ill. 41.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

We concur in the views expressed in the foregoing opinion of Mr. Justice MORAN, both upon the law and the facts.

The acts required to be done by the respective parties, after the signing of the contract, are to be done in this order: First, Cravener is to pay \$500 in cash, which was done;

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Opinion of the Court.

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second, Hale is to furnish to Cravener, on or before January 10, 1887, or as soon thereafter as the probate proceedings in the estate of Matilda Hale, deceased, can be finally settled and the abstract of title continued to show such settlement; an abstract of title, showing good title, and power and authority to sell and convey; third, Cravener is to pay Hale, ten days after said abstract shall have been furnished, \$3500, and execute the notes and mortgage stipulated, for the balance of the purchase money; fourth, Hale is to convey the land described to Cravener, in fee simple, free and clear of all incumbrances whatever, by a good and sufficient warranty deed.

Each party, it will thus be seen, is obligated, absolutely, to perform his undertaking in the order thus stated. There is no stipulation whereby either shall be released therefrom without the consent of the other. The doing of the preceding act by the one, necessitates the doing of the succeeding act by the other. Of course, either party may waive (because he may give away what he pleases) the doing of the preceding act by the other, and proceed to the performance of the succeeding act; but unless he shall do so, this order of sequence must be observed.

The stipulation that in case the abstract of title to be furnished does not show a good title, the \$500 paid at the date of the execution of the contract shall be returned and the contract determined, can not be taken advantage of by Hale, because, first, it is manifestly designed for the benefit of Cravener, only. Hale, it is to be presumed, knows the title he has, while Cravener does not; and since it can not affect Hale adversely if Cravener shall be content to take a bad title, he may elect to take any title which the abstract discloses. Second, Hale's undertaking to convey is entirely independent of his ability to furnish the required abstract, and is in no respect conditional.

Cravener does not now have an option to take the title of Hale, or not, at his election. He had an option to accept the

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Syllabus.

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title offered, or to reject it, because of the pendency of the suit, unknown to him and not disclosed by the abstract, to set aside the will, when he learned the pendency of that suit; but that he waived, by an agreement, tacitly, at least, made with Hale, to postpone the further execution of the contract until the termination of that suit. If that suit results in sustaining the will, he is obliged to accept the title, and he can exercise no option whatever, and the contract is not, therefore, unilateral in this respect.

The judgment is affirmed.

*Judgment affirmed.*

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128	422
146	570
128	422
57a	685
128	422
171	252
128	422
190	1 24
128	422
1201	1854

THE ST. LOUIS BRIDGE COMPANY

v.

THE PEOPLE *ex rel.* James D. Baker, Collector.

*Filed at Mt. Vernon May 10, 1889.*

1. TAXATION—*town board of review—adjourned meeting.* On the fourth Monday of June, which was the 27th, the assessor and town clerk met to hear complaints in respect of the assessment of property in the town. On objection being made to the assessment of a bridge structure, an adjournment was made to the following day on account of the death of the supervisor, and so on until July 2, when the successor of the supervisor was appointed, and was present, and the assessment of the bridge was raised, on the complaint of the mayor of the city in which the bridge was situated: *Held*, that the action of the board of review in adjourning was not contrary to law.

2. SAME—*evidence—to show meeting and adjournment of town board.* The record of a town clerk showing that he and the local assessor met to review the assessment of property, and an adjournment of the hearing of complaints to a subsequent day, is the best evidence of the fact of such meeting and adjournment.

3. SAME—*who may complain in respect to an assessment.* The township board of review may increase the assessment of any particular property on the application of any person who shall complain. The right to make such application is not confined to tax-payers. A city interested on account of its revenues may make the application through its mayor.

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Brief for the Appellant.

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4. **SAME—appeal to the county board.** Where the town board of review improperly increases an assessment, it would seem that the owner of the property assessed may apply to the county board, under section 97 of the Revenue act.

5. **SAME—return of assessor's books.** Section 90 of the Revenue act, requiring the assessor to return his books to the county clerk on or before the first day of July, is directory, merely, and under sections 191 and 280, the failure of the assessor to return his books on the day fixed will not vitiate the assessment.

6. **CROSS-ERRORS—whether necessary.** On appeal of a tax-payer from a judgment of the county court, the appellee (the collector) can not allege for error the refusal of the county court to render judgment for a particular tax, unless cross-errors have been assigned on the record in accordance with the rule of this court.

**APPEAL** from the County Court of St. Clair county; the Hon. JOHN B. HAY, Judge, presiding.

Messrs. G. & G. A. KOERNER, for the appellant:

Under section 86 of the Revenue law, the assessor, town clerk and supervisor are required to meet on the fourth Monday of June, and to review the assessment on the complaint of any person aggrieved, or who complains that the property of another is assessed too low. Any two of the officers may act, and they may adjourn from day to day. The illness or death of one of them is no excuse for not meeting and attending to the business presented. All complaints must be made on the fourth Monday of June, and none can be acted on which are not made on that day. Statutory provisions regarding such board are mandatory, and a compliance is held a condition precedent to any further proceeding. Cooley on Taxation, 365; *Marsh v. Chesnut*, 14 Ill. 223; Blackstone on Tax Titles, 42; *Nashville v. Weiser*, 54 Ill. 245; *Bank v. Cook*, 77 id. 622.

"When, therefore, either directly by the statute, or by some officer or board under its authority, a certain time is fixed for the meeting of a board of review, and the board fails to meet, \* \* \* the tax proceeding must be regarded as having failed to become effectual, because of the officer failing properly to

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Brief for the Appellee.

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follow them up as required by law. No argument can be admitted in such case which proposes the acceptance of something else." Cooley on Taxation, 366; *Coburn v. Coe*, 57 N.H. 556; *Stuart v. Palmer*, 74 N.Y. 183.

The meeting of the commissioners of highways, under section 13, for the levy of the road and bridge tax, was required to have been held on the first Tuesday of September. *Railroad Co. v. People*, 116 Ill. 243; *Railway Co. v. Commissioners*, 117 id. 279.

However, whether there was a reason for it or not, the law is imperative that this meeting of commissioners should be held on the Tuesday preceding the annual meeting of the board of supervisors.

With *quasi* corporations, such as commissioners of highways, the rule obtains, that their power to impose taxes will be strictly construed. This is the language of this court in *Comrs. of Highways v. Newell*, 80 Ill. 587. The time of their meeting for the purpose of levying the tax is jurisdictional; no authority is given them anywhere in the statutes to levy a tax at any other time. No authority is given the commissioners to meet on that day and adjourn their meeting for action to a later day. If they had such an authority the proof shows that they did not exercise it. They did not meet at the office of the auditors, nor anywhere else. They passed no resolution to adjourn. According to the testimony of one of the commissioners, they agreed to meet when the sick commissioner would be well, not even fixing a certain day. If they had met there would have been a quorum to transact business, and they knew, as they testified, that they could transact business. See, also, as to the proof of jurisdiction, *Sanderson v. La Salle*, 57 Ill. 441.

Mr. GEORGE HUNT, Attorney General, for the appellee:

Error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of

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Brief for the Appellee.

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the taxes, not affecting the substantial justice of the tax itself, does not vitiate, or in any manner affect, the tax or assessment thereof. *Union Trust Co. v. Weber*, 96 Ill. 351; *Gage v. Bailey*, 102 id. 17.

The remedy for an excessive valuation is by application to the town board of review, under section 86 of the Revenue law, and to the county board, under section 97 of the same law. *Stock Exchange v. Gleason*, 121 Ill. 524; *People v. Lots in Ashley*, 122 id. 297.

The cases holding the statute mandatory as to the holding of the board of review were decided before the adoption of our present statute, which has worked a radical change. *Chiniquy v. People*, 78 Ill. 570.

The precise day for levying the road and bridge taxes, under sections 13, 14 and 16 of the Road law, is not material, but it will be sufficient if the certificate is filed with the county clerk in time to have the tax extended. *Railway Co. v. People*, 116 Ill. 232.

When the requirement of the law which has failed of observance is one which has regard simply to the due and orderly conduct of the proceedings, or to the protection of the public interests as against the officer, so that to the tax-payer it is immaterial whether it was complied with or not, a failure to comply ought not to be recognized as a foundation for a complaint by him. Cooley's Const. Lim. 520, note 2.

Lord MANSFIELD would have the question whether a law is mandatory or not depend upon whether that which was directed to be done was or was not of the essence of the thing required. *Rex v. Locksdale*, 1 Burr. 447.

The Supreme Court of New York, in an opinion approved by the Court of Appeals, said: "Statutes directing the mode of proceeding by public officers are directory, and are not regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute." *People v. Cook*, 14 Barb. 290; 8 N. Y. 67.

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Opinion of the Court.

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Under the statute of 1873, and section 191 of the Revenue Code, a failure to levy and return local municipal taxes within the time specified by law will not defeat their collection. *Buck v. People*, 78 Ill. 566; *Chiniquy v. People*, id. 570; *Railway Co. v. People*, 119 id. 211; *Moore v. Fessenbeck*, 88 id. 422; *Railroad Co. v. Surrell*, id. 535; *Thatcher v. People*, 79 id. 597; *Riverside Co. v. Howell*, 113 id. 267; *People v. Railroad Co.* 88 id. 537.

Mr. F. G. COCKRELL, for the city of East St. Louis.

Mr. R. D. W. HOLDER, for the appellee Baker.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This was an application by appellee, as county collector of Saint Clair County, to the County Court of that county for judgment against delinquent lands. The appellant, the Saint Louis Bridge Company, one of the owners of lands and lots reported as delinquent, appeared and filed three objections to the entry of judgment for the amount of tax reported to be due on the St. Louis Bridge structure. The County Court sustained one of the objections, but overruled the two others, and rendered judgment against property, etc. The case comes before us on appeal from this judgment of the County Court.

The first of the overruled objections is, that the assessment of the bridge structure, made by the township assessor, was illegally raised by the town board of review. The assessor of the township valued the property at \$750,000.00; the board of review raised this valuation to \$1,000,000.00; the State Board of Equalization accorded a reduction of twenty per cent, so that the amount, on which the taxes were assessed, was \$800,000.00. The increase complained of by appellant is that of \$750,000.00 to \$1,000,000.00.

The 86th section of the Revenue Act provides, that, "in counties under township organization, the assessor, clerk and supervisor shall meet on the fourth Monday of June for the

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Opinion of the Court.

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purpose of reviewing the assessment of property in such town." In the present case the fourth Monday of June was June 27, 1887. Appellant contends, that no meeting of the board took place on that day. It is true, that one Noel, a deputy assessor, says that "as he understands," no meeting took place on June 27, 1887, on account of the illness of John P. Timlin, the supervisor.

But the best evidence upon this subject is the record of the town clerk of East St. Louis. This record was produced in evidence and is not discredited in any way. It shows that the assessor and the town clerk met on Monday, June 27, 1887; that complaint was then made that the property of the Bridge Company was assessed too low; that an adjournment was had until June 28, 1887, and that on each day thereafter an adjournment was had until July 2, 1887. These adjournments took place from day to day, on account of the death of the supervisor, Timlin, which occurred on the night of June 27, and on account of the proceedings for the election of his successor, which resulted in the election, on June 30, of H. C. Boughan, as such successor. The Board, composed of the clerk, the assessor and the new supervisor, met on Friday, July 1, to hear the matter of the increase of the assessment. The attorney of appellant was present, and it was agreed, that the hearing should be had on the next day, Saturday July 2. On the latter day, the assessment was reviewed by the board. The attorney of the appellant was present at the review, and participated in the proceedings, introducing and examining as many as three witnesses.

Counsel for appellant claim, that, as "any two of said officers meeting are authorized to act" by the terms of section 86, the assessor and town clerk should have proceeded to review the assessment on June 27 in the absence of the supervisor, and that the illness and death of the supervisor furnished no excuse for the adjournments. The section says, that any two members of the board "may adjourn from day to day, till they

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Opinion of the Court.

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have finished the hearing of all cases presented on said day," that is, the fourth Monday in June. The case of appellant's property was presented on that day by the application of the Mayor of East St. Louis, complaining that the bridge structure was assessed too low. The board had the power to adjourn as it did, and we see no reason for holding, that respect for the memory of their deceased associate, and a desire to have the assistance of his successor in the performance of their duties, were unworthy reasons for the exercise of such power.

It is said, that the board of review should have closed its labors before Friday, July 1, because the assessor is required by section 90 of the revenue act to return his books to the county clerk on or before the first day of July of the year, for which the assessment is made. But we have held that, under sections 191 and 280 of the act, the failure of the assessor to return the assessment on the day fixed by the statute does not vitiate the assessment. (*Purrington v. People*, 79 Ill. 11; *Eurigh v. People*, 79 id. 214.)

It is also urged, that the complaint as to the lowness of the assessment must be made to the board, by a tax-payer, and that the City of East St. Louis, acting through its mayor, was not a tax-payer. We think the complaint was properly made by the city, as the latter was interested in the amount of the tax to be raised. Section 86 says that the assessment may be reviewed upon the application of "any person who shall complain" etc. Such application is not confined to tax-payers by the terms of the section.

Without specially noticing any other supposed errors or informalities, to which counsel for appellant refer, we deem it sufficient to say, that they do not affect the substantial justice of the tax, and, therefore, under section 191 of the revenue act, do not vitiate the assessment. It is also to be observed, that the appellant did not ask the County board, at its meeting on the second Monday in July, to review and correct the assessment, as provided for in section 97 of the revenue law.

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Opinion of the Court.

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We think that the objection to the increase of the assessment was properly overruled by the County Court.

The second of the overruled objections is, that the special road and bridge tax for 1887 within the township of East St. Louis was illegally levied by the Highway Commissioners of said township.

The tax is claimed to be illegal, because it was levied at a meeting of the Highway Commissioners held on September 13, 1887. It is contended that the levy should have been made on September 6, 1887, and that, on that day, the commissioners held no meeting.

This objection is discussed in the cases of *St. Louis Nat. Stock Yards v. People ex rel. Baker, Collector*, and *The St. Louis Bridge & Tunnel R. R. Co. v. The People ex rel. Baker, Collector*, 127 Ill. pages 22 and 627. The rulings in those cases must govern in this case. The objection was there overruled as to the levy of forty cents made on September 13, 1887, but sustained as to the levy of twenty cents made on October 20, 1887.

The objection made by the appellant in the court below, which was sustained, related to the special tax for the year 1887 levied by the city of East St. Louis. Counsel for appellee contend in their briefs, that the County Court erred in sustaining the objection of the Bridge Company to this special tax. All the proceedings of that court in relation to such tax are in the record now before us, but we can not review them, because appellee has failed to assign cross-errors in accordance with the rule. Cross-errors must be assigned within two days after the record is filed in this Court, and not afterwards without special leave of the court; and the assignment of cross-errors, as well as of errors, must be written upon or attached to the record.

For the error in rendering judgment for the additional road and bridge tax of 20 cents on the \$100.00 valuation levied October 20, 1887, the judgment of the county court is reversed and the cause is remanded.

*Judgment reversed.*

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Syllabus.

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WILLIAM HAWARD *et al.*

v.

ANGENETTE J. PEAVEY.

*Filed at Ottawa May 16, 1889.*

128	430
131	159
128	430
144	419
145	641
146	26
128	430
174	353
128	430
208	*853
205	*558
205	*559
108a	10
28	480
28	*515

1. WILLS—equitable conversion—as, *a change in the nature of property—real estate to personal, and personal estate to real.* An equitable conversion is defined to be that change in the nature of property by which, for certain purposes, real estate is considered as personal and personal estate as real, and transmissible and descendible as such. It is an application of the maxim, that equity regards that as done which ought to be done.

2. It is not essential that there should be an express declaration in the instrument that the land shall be treated as money although not sold, or that the money shall be treated as land although not actually laid out in the purchase of it. Such direction may arise, by necessary implication, from the nature of the instrument or the language employed.

3. There must, however, be an expression, in some form, of an absolute intention that the land shall be sold and turned into money, or that the money shall be expended in the purchase of land. The test is, has the will or deed absolutely directed that the conversion be made. In order to work a conversion while the property remains unchanged in form, there must be a clear and imperative direction to convert it.

4. If the act of converting is left to the option, discretion or choice of the trustees or others charged with making it, no equitable conversion will take place, because no duty to make the change rests upon them.

5. In this case, a testator devised all his estate after the payment of debts, etc., to his executors, in trust, for the support of his widow, and provided that on her death or marriage the executors should divide the property among his five children, or such of them as should then be living, or the lawful issue of such as might be dead. He also expressed a wish that the land be kept in the family, and authorized his executors to sell it to any of his sons at its full value, and provided that if any of his sons had any money advanced for them to begin with, the others should be made equal to them in the division: *Held*, that the executors were given a power of sale, the purchasers being limited to his sons, but that no imperative duty of sale was imposed, and hence there was no equitable conversion of the land into money. In such case, if no one of the sons was willing to purchase and pay the full value of the land, the power of sale could not be executed.

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Statement of the case.

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6. **REMAINDER—whether vested or contingent.** A remainder is vested when a present interest passes to a party to be enjoyed in the future, so that the estate is invariably in a determinate person after the particular intervening estate terminates; while a contingent remainder is one limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event.

7. It does not follow, however, that every estate in remainder which is subject to a contingency or condition, is a contingent remainder. The condition may be precedent or subsequent. If the latter, the estate vests immediately, subject to being defeated by the happening of the condition, while in the former the remainder can not vest until that which is contingent has happened, and therefore become certain.

8. A testator devised all his estate to his executors, in trust, for the benefit of his widow for life, or until her marriage, with the remainder to such of his children as should be alive at the termination of the precedent estate, or to the lawful issue of such of them as might be dead leaving such issue: *Held*, that the estate devised to the sons was a contingent remainder, until the happening of the contingency that the persons who were to take the estate should be alive at the death or re-marriage of the widow. In such case, it makes no difference that the sons were named in the devise.

9. **SALE ON EXECUTION—contingent remainder.** A contingent remainder is not subject to sale on execution against the party entitled to the same.

APPEAL from the Circuit Court of La Salle county; the Hon. GEORGE W. STIPP, Judge, presiding.

This was a petition for partition, brought by Angenette J. Peavey, in which she claims title in fee to an undivided one-fourth of certain lands formerly owned by one James Haward. On the 16th day of April, 1866, said Haward died testate, being seized in fee at the time of his death of the lands described in the petition, and leaving him surviving Ellen Haward his widow, and William Haward, George Haward, Robert Haward, James Haward and Thomas Haward, his children and only heirs at law. His will, which was duly admitted to probate, was as follows:

"This is the last will of me, James Haward, farmer, of Eden Township, county of La Salle and State of Illinois, in manner following:

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Statement of the case.

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"First, I will and direct that all my just debts, funeral expenses and the costs of proving this my will, may be paid out of my personal estate as soon as convenient after my decease, and the rest and residue of my property, wheresoever situated and of what nature and kind soever, to be given in trust to my executors for the benefit and support of my wife Ellen, so long as she shall remain my widow and unmarried; that she and my two sons, James and Thomas, and also Robert, if they think best, may carry on my said farm or any part of it, also to send the said James and Thomas to school, one at a time, to improve their education; and if at any time my said wife and sons may wish to give up farming, it shall and may be lawful for my executors to sell all my personal estate to the highest bidder, and the proceeds thereof to be invested in some secure place, and the interest of said money and also the rent of my real property to be given to my wife to be used as aforesaid; but be it understood that my two old mares known by the names of Pigeon and Kitty shall not on any account be sold out of the family; if my said wife does not wish to keep them, any one of my sons may have them to keep, but if none of the family will keep them, my executors shall cause them to be destroyed and buried.

"On the death of my wife, or in the event of her marrying again, my executors shall then proceed to divide the property among my children. To my son William I give two hundred dollars as his share, as I think he is better provided for than any of the others, and the land I wish to be kept in the family, and the executors may sell it to any of the boys at its full value, and the proceeds of all my property, both real and personal, to be divided among my several children, William as above mentioned two hundred dollars, and the residue equally divided between such of my children, George, Robert, James and Thomas, as may be then alive, or the lawful issue of such of them as may be dead leaving lawful issue.

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Statement of the case.

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"And, lastly, I nominate and appoint my said wife Ellen executrix, and my sons William and Robert executors, of this my will, and that they be paid all reasonable expenses for their trouble in executing this my will, and if any of my sons have any money advanced for them to begin with, the others must be made equal to them in the division of the property."

Ellen Haward, the widow, remained unmarried until her death, which occurred July 26, 1886. On the 20th day of December, 1877, and during the lifetime of said widow, the petitioner recovered a judgment in the Circuit Court of the United States for the Northern District of Illinois against Robert Haward, one of the sons, for \$963.16 and costs. On the 15th day of May, 1882, the interest of said Robert Haward in said land was sold on an *alias* execution issued on said judgment, the petitioner becoming the purchaser, and in due time a marshal's deed was executed to her, and under that deed she claims title in fee to an undivided one-fourth of said land. The widow lived upon and occupied said land until her death, and no part of it has ever been sold or conveyed by the executors. On the 5th day of March, 1878, James Haward conveyed his interest in said land to William Haward, and on the 8th day of the same month Robert Haward also conveyed his interest to William Haward. At some time prior to the hearing, the date not being shown by the record, Thomas Haward died intestate and without issue.

At the hearing the court found the petitioner to be the owner in fee of an undivided three-twelfths, William Haward of an undivided five-twelfths and George Haward of an undivided four-twelfths of said land, and a decree was entered accordingly. It being admitted by all the parties that said premises were so situated as not to be susceptible of division without manifest prejudice to the owners thereof, it was ordered that it be sold and the proceeds, after the payment of costs, be divided between the parties according to their respective interests

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Briefs of Counsel. Opinion of the Court.

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as found by the decree. William Haward and George Haward have thereupon appealed to this court.

Messrs. DUNCAN & GILBERT, for the appellants:

That a devise of real estate which is to be converted into money and the money distributed, is a devise of money and not of land, and that it can not be sold under execution against the devisee, has been repeatedly decided by this court. *Baker v. Copenbarger*, 15 Ill. 103; *Jennings v. Smith*, 29 id. 116.

It is not essential, however, that the direction should be express in order to be imperative. It may be necessarily implied. Pomeroy's Eq. Jur. sec. 1160; Bispham's Eq. secs. 311, 312; *Wert's Exrs. v. Page*, 19 N. J. Eq. 365.

If there was no equitable conversion, the devise was not vested, but contingent, and the interest was not subject to levy and sale under execution. Freeman on Executors, sec. 178; *Baker v. Copenbarger*, 15 Ill. 103; *McIlvaine v. Smith*, 42 Mo. 45; *Olney v. Hull*, 21 Pick. 311; *Nash v. Nash*, 12 Allen, 345; *Putnam v. Gleason*, 99 Mass. 454; *White v. Woodberry*, 9 Pick. 139; *Richardson v. Wheatland*, 7 Metc. 166; *People v. Jennings*, 44 Ill. 448.

Mr. L. LELAND, for the appellee:

That there was not an equitable conversion of the land into money, see Story's Eq. Jur. sec. 1214; Jarman on Wills, 483.

That the interest of Robert Haward was vested, and not contingent, see 4 Kent's Com. 203; 1 Jarman on Wills, 631, 632; *Railsback v. Lovejoy*, 116 Ill. 442; *Female Academy v. Sullivan*, id. 375; *Hurt v. McCartney*, 18 id. 129; *Loan Co. v. Bonner*, 75 id. 316; *Lunt v. Lunt*, 108 id. 307; *Schofield v. Olcott*, 120 id. 362.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

The petitioner in this case claims title in fee to an undivided one-fourth of the land in question by virtue of the sale under

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Opinion of the Court.

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execution of Robert Haward's interest therein, and the decree can be sustained only upon the theory that at the time of the levy and sale, Robert Haward was the owner of an estate in said land subject to execution. The appellants insist that Robert Haward at that time had no vested interest in the land, and in support of their contention they submit two propositions, viz.: First. That by the will of James Haward, deceased, said land was directed to be converted into money and the money divided among his sons, thus working an equitable conversion of the land, *eo instanti*, upon the death of the testator. Second. If there was no conversion, the interest given to Robert Haward by the will of his father was not a vested but a contingent remainder, and that such remainder did not become vested until after said levy and sale. It must be admitted that if either of these propositions can be sustained, the sale under the execution was nugatory, and vested no title in the purchaser.

Did the will of James Haward operate as an equitable conversion of said land? Conversion has been defined to be, that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such. It is an application of the maxim that equity regards that as done which ought to be done. It is not essential that there should be an express declaration in the instrument that the land shall be treated as money, although not sold, or that the money shall be treated as land although not actually laid out in the purchase of it. Such direction may arise by necessary implication from the nature of the instrument or the language employed. But there must be an expression, in some form, of an absolute intention that the land *shall* be sold and turned into money, or that the money *shall* be expended in the purchase of land. The test is, has the will or deed absolutely directed that the conversion be made? In order to work a conversion while the property remains unchanged in form,

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Opinion of the Court.

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there must be a clear and imperative direction to convert it. If the act of converting is left to the option, discretion or choice of the trustees or others charged with making it, no equitable conversion will take place, because no *duty* to make the change rests upon them. 3 Pomeroy's Eq. Jur. sec. 1159 *et seq.* and authorities cited. In *Anewalt's Appeal*, 42 Pa. St. 414, the court lays down the rule, in language quoted from the standard authorities, as follows: "To establish a conversion, the will must direct it absolutely or out and out, irrespective of all contingencies. The direction to convert must be positive and explicit, and the will, if it be a will, or the deed, if it be by contract, must decisively fix upon the land the quality of money. It must be an imperative direction to sell."

Does the will of James Haward contain an absolute direction, either in express terms or by implication, to convert the land of the testator into money and distribute it among his sons in that form, so as to leave to his executors no discretion on that subject? Said will assumes to deal with both real and personal estate, and as we have no information on the subject outside of the will, we may assume that the testator, at the time of his death, was the owner of personal as well as real property. The will gives all his property, both real and personal, to his executors, in trust for the benefit and support of the testator's wife so long as she should remain his widow, and it was provided that the widow and certain of the sons might, if they thought best, carry on the farm or a part of it, or if they wished to give up farming, the executors were authorized to sell his personal property and invest the proceeds, and rent the land, paying to the widow the rent and the interest on the money invested. The direction to convert the land into money, if it exists at all, must be found in the following clause of the will:

"On the death of my wife, or in the event of her marrying again, my executors shall then proceed to divide the property among my children. To my son William I give two hundred

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Opinion of the Court.

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dollars as his share, as I think he is better provided for than the others, and the land I wish kept in the family, and my executors may sell it to any of the boys at its full value, and the proceeds of my property, both real and personal, to be divided among my children, William, as above mentioned, two hundred dollars, and the residue equally divided between such of my children, George, Robert, James and Thomas, as may be alive, or the lawful issue of such of them as may be dead leaving lawful issue."

By this clause the executors were clearly given a power of sale, the persons who might become purchasers being limited, however, to the testator's sons, the reason of such limitation being the testator's desire to keep the land in the family. But we fail to find any provision which, either expressly or by implication, made it imperative that the executors should exercise that power. Said clause first provides in terms for a division of the property among the testator's sons upon the termination of the widow's equitable estate. That provision standing alone would have made it imperative upon the executors to divide the property as it stood without a sale. But it being the testator's desire that his land should remain in his family, he provided further, that his executors might sell the land to one of his sons, if any one of them was willing to buy and pay its full value, and make distribution by dividing the proceeds. It seems clear that the power of sale was given as an alternative and not as the exclusive mode of making division of the property. The testator's wish that the land should be kept in the family seems to have furnished a governing principle in drafting the will, and that wish would be equally well accomplished by dividing the land itself among his sons, or by selling it to one of them and dividing the proceeds.

It should also be observed that the language of the will does not require the land to be sold, but only provides that it may be sold, and in case of sale the possible purchasers were limited to five persons. Because of such limitation it became

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Opinion of the Court.

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necessary to provide that the purchaser should pay the full value of the land, for otherwise it might be sacrificed by reason of a lack of competition. It would have been repugnant to the very purpose for which a sale was permitted to allow the land to be sold to a stranger, as that would manifestly have taken it out of the family. If no one of the sons therefore had been willing to purchase and pay its full value, the power of sale could not have been executed. In that case the only division possible would have been a division of the land.

An argument is sought to be based upon the following phrase of the clause of the will above quoted, viz., "the *proceeds* of all my property, both real and personal, to be divided among my several children," etc. That language is a part of the provision permitting a sale, and its force is merely that, in case of a sale, the proceeds should be divided. It clearly was not intended to apply to the division in case the land itself should be divided.

Nor can we perceive any special significance, as bearing upon the question under consideration, of the last clause of the will which provided that, "if any of my sons have any money advanced for them to begin with, the others must be made equal to them at the division of the property." It is not claimed that any such advances had been made by the testator in his lifetime, and the language here quoted must be deemed to have reference to possible advances made to the sons by the executors, or it may be by the widow, out of the personal estate, during the lifetime of the widow. We are unable to see how an adjustment of such advances was not quite as practicable under one mode of division as under the other. Even if there was not sufficient personal estate for the purposes of such adjustment, and it is not shown that there was not, the necessity of making it would interpose no obstacle to the division of the land without a sale.

We are of the opinion that there was no absolute requirement in the will that the land should be sold, but that the

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Opinion of the Court.

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sale was left to the discretion of the executors, and as no sale was actually made under the power, there was no equitable conversion of the land.

The lands of James Haward, deceased, being devised to his executors to be held in trust for his widow during widowhood, and then to be divided among his children, the four sons specially named in the will took only an estate in remainder, and the material question here is, whether the remainder devised to his son Robert was, at the time of the execution sale, vested or contingent. The proposition is not controverted that if it was merely contingent, it was not subject to sale on execution. This proposition seems to be supported by the following authorities: *Watson v. Dodd*, 68 N. C. 530; *Jackson v. Middleton*, 52 Barb. 9; *Baker v. Copenbarger*, 15 Ill. 103; Freeman on Executions, sec. 178.

The will provides that, upon the death or re-marriage of the widow, the executors shall proceed to divide the estate of the testator among his children, but in fixing the mode in which the division shall be made, it provides that William shall be given two hundred dollars in money as his share, "and the residue equally divided between such of my children, George, Robert, James and Thomas, as may be then alive or the lawful issue of such of them as may be dead leaving lawful issue."

A remainder is said to be vested where a present interest passes to a party, to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates; while a contingent remainder is one limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event. 2 Black. Com. 168. This definition is adopted, in substance, by all the text writers, and is sufficiently accurate. But it does not necessarily follow that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder can not vest until that which is contingent has

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Opinion of the Court.

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happened and thereby become certain. If the latter, the estate vests immediately, subject to be defeated by the happening of the condition. *Bromfield v. Crowder*, 1 Bos. & Pul. 313; *Blanchard v. Blanchard*, 1 Allen, 223; *Manice v. Manice*, 43 N. Y. 380; Washburn on Real Property, (4th ed.) 579. It is plain that in the present case the estate devised was, so far as Robert Haward was concerned, subject to a contingency, viz., his being alive at the time the particular estate should be determined by the death or re-marriage of the widow. Whether this contingency constituted a condition precedent or subsequent must be determined by the language of the will.

While the proper construction of the will is not a matter wholly free from doubt, it seems to be clear that the intention of the testator was not to devise to his son Robert a present estate subject to be defeated in case of his death before the termination of the particular estate, but to make the estate itself conditional upon his being alive at that time. The devise was not to him, nor to him and his three brothers, but only to such of the four as should be alive at the death or re-marriage of the widow. If one or more of the sons named had died before the death of the widow, it would have been doing violence to the language of the will to hold that any estate was thereby vested in them. They would have been excluded by the very terms of the will from the number of those named as beneficiaries. The persons to whom the estate would go being wholly uncertain during the continuance of the particular estate, it must be held that the contingency named, viz., that the persons who were to take the estate should be alive at the death or re-marriage of the widow, was a condition precedent to the vesting of the estate, and that until the condition happened the estate was necessarily contingent.

The cases to be found in the reports, so far as they can aid us in the interpretation of the will under consideration, seem to support the view we have here expressed. In *Olney v. Hull*, 21 Pick. 311, the testator, after devising to his wife the use

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Opinion of the Court.

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of his real estate while she remained his widow, proceeded as follows: "Should my wife marry or die, the land shall then be equally divided among my surviving sons, with each son paying \$60 to my daughters, to be equally divided among them, as soon as each son may come into possession of said land." It was held that until the death or marriage of the widow it was uncertain who would be alive to take, and therefore, that no estate vested in any one before that event happened.

In *Nash v. Nash*, 12 Allen, 345, the testator devised the use of his real estate to his wife during life, and at her death the fee to such of his children as might be then living, share and share alike, and it was held that, during the life of the widow, the estates given to the children were contingent and not vested.

In *Thomson v. Ludington*, 104 Mass. 193, the testator gave his estate to his widow during life or widowhood, and directed that at her decease or marriage, the estate should be divided "equally to and among such of my children as shall then be living, share and share alike; the names of my said children are George C., Ann L., Lucy M., Francis H. and Caroline E., to them and to their heirs and assigns forever." It was there held that the will gave only a contingent remainder to such of the children as should happen to be living when the contingency of such death or marriage happened.

The case of *Blanchard v. Blanchard*, 1 Allen, 223, may be referred to as a fair illustration of a vested remainder, liable to be divested by the happening of a condition subsequent. There the testator devised to his wife all the income of all his real and personal property, and then devised as follows: "I give and bequeath to my beloved daughter Elizabeth Ford Blanchard, to my daughter Mary Jane Blanchard, to my daughter Anna Dawson Morrison Blanchard, to my son Henry Blanchard, and my son Samuel Orne Blanchard, all the property both real and personal that may be left at the death of my wife, to be divided equally between the five last named

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Opinion of the Court.

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children. And provided, furthermore, that if any of the last five named children die before my wife, then the property to be equally divided between the survivors, except they should leave issue, in that case to go to said issue, provided the said issue be legitimate." The testator had ten children, all of whom survived the wife. The court held that the portion of the clause above quoted preceding the proviso presented the ordinary case of a devise to the wife for life, remainder in fee at her death to five of her children, to be equally divided between them. There being in that portion of the devise no words of contingency, such as "if they shall be living at her death," or "to such of them as shall be living," the usual and proper phrases to constitute a condition precedent, a vested remainder was created in the children named as tenants in common. In construing the proviso, it was admitted that, if its effect was to limit the remainder to such of the children named as should survive their mother, the remainder would be contingent, but it was held, after a full review of the authorities, that the proviso merely introduced into the devise a condition subsequent, and that the remainder was vested, subject to be divested upon the happening of the condition.

The foregoing cases sufficiently illustrate the principles upon which the will in this case must be construed. The devise was to such of four persons as should be alive at the termination of the particular estate. Until that time arrived it could not be told who were to be the beneficiaries of the devise. Until that time the persons to take were not and could not be identified, and until that time it was wholly uncertain whether Robert Haward was one of them or not. It follows that, at the time the land in question was sold under execution, Robert Haward's interest was only a contingent remainder, which was not subject to levy and sale, and that no title therefore passed to the purchaser by the marshal's deed.

An attempt is made to distinguish this case from the cases above cited upon the fact that in this case the four possible

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Syllabus.

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beneficiaries of the devise were mentioned by name, while in the cases cited, or in most of them, the devise was to the children who should be alive at the termination of the particular estate, as a class. Even that distinction does not exist between this case and *Thomson v. Ludington*, as there the children were all mentioned by name, and it is not even suggested there that that fact made any difference with their rights. But we are unable to see how there can be any greater degree of certainty in the designation of the beneficiaries where all the persons in the class are mentioned by name, than where they are simply designated as a class, so long as the devise is only to such of the persons named, or of the class, as may be alive at the expiration of the life estate. The contingency grows out of the use of the words, "to such of them as shall be living," which, as said in *Blanchard v. Blanchard*, is a proper phrase to constitute a condition precedent.

The decree of the court below finding that the petitioner is the owner in fee of an undivided one-fourth of the lands sought to be partitioned is unsupported by the evidence. The decree will therefore be reversed and the cause remanded.

*Decree reversed.*

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EDWARD PRINCE

v.

THE CITY OF QUINCY.

128	443
45a	598
128	443
47a	484
128	443
63a	217
65a	608
128	443
176	410
176	415

*Filed at Springfield May 14, 1889.*

1. **MUNICIPAL INDEBTEDNESS—constitutional limitation.** A city can not be held liable in tort for the simple refusal of its council to pay an indebtedness contracted in contravention of section 12, article 9, of the constitution, and thus recover in damages the precise amount of that indebtedness, with interest from the time it became due.

2. The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution, to carry on their corporate

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Brief for the Appellant.

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operations, while so indebted, upon the cash system, and not upon credit, to any extent or for any purpose.

3. If an indebtedness of a city for current expenses and supplying water is forbidden, as being in excess of the constitutional limit, the contract upon which it arose, though in itself executory and creating only a contingent liability, is also forbidden. Prohibition of the end is prohibition of the direct, designed and appropriate means.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. CHARLES J. SCOFIELD, Judge, presiding.

Mr. WILLIAM McFADON, for the appellant:

The constitutional provision relating to indebtedness, above referred to, does not abolish or extinguish any of the powers of a city in relation to current expenses, as the same are conferred by its charter, but its chartered powers in such regard are, notwithstanding said provision, still left in force as there conferred. *Valparaiso v. Gardner*, 97 Ind. 1; *Grant v. Davenport*, 36 Iowa, 396; *East St. Louis v. Gas Co.* 98 Ill. 415; *Railway Co. v. City of Jacksonville*, 114 id. 567; *Laycock v. Baton Rouge*, 35 La. Ann. 475; *Tax-payers' Association v. City of New Orleans*, 33 id. 571.

Quincy, by its charter, and prior to the passage of the constitutional provision aforesaid, being empowered "to provide the city with water, to erect hydrants and pumps in the street for the convenience of its inhabitants," had the power to do the same thing after and notwithstanding the going into force of said provision. *City of Quincy v. Bull*, 106 Ill. 350; Private Laws, 1857, p. 181, sec. 22; Sess. Laws, 1840, p. 116, sec. 8.

The ordinance of Quincy, and the contract thereby created, was fully authorized by the power conferred on Quincy, and last above cited. *City of Quincy v. Bull*, 106 Ill. 350; *Valparaiso v. Gardner*, 97 Ind. 1; *Indianapolis v. Gas Light Co.* 66 id. 400; *East St. Louis v. Gas Co.* 98 Ill. 415; *Gas Light Co. v. Des Moines*, 44 Iowa, 508; *Grant v. Davenport*, 36 id. 396.

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Brief for the Appellant.

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The city indebtedness, if upon a time contract for current expenses, does not arise at the time of making such contract. The true rule is, that the indebtedness under such contract only arises from month to month, as and when the article contracted for is furnished. *East St. Louis v. Gas Co.* 98 Ill. 430; *Valparaiso v. Gardner*, 97 Ind. 1; *Grant v. Davenport*, 36 Iowa, 396; *Neston v. Syracuse*, 17 N. Y. 113; *Laycock v. Baton Rouge*, 35 La. Ann. 475; *Reynolds v. Shreveport*, 13 id. 430; *State v. McCauley*, 13 Cal. 439; *People v. Pache County*, 27 id. 175.

The decisions of courts upon contracts which have been held payable out of revenue or a special revenue, become, then, applicable to the case in hand, and from these decisions it is clear, in such cases, that any default on the part of municipal authorities in collecting such revenue, or in taking the necessary steps to give such revenue to the parties entitled to the same, or to make the same available to them, is a wrong on the part of the officers, for which the city itself is liable in an action of tort. *Clayburgh v. City of Chicago*, 25 Ill. 536; *Lansing v. Van Gorder*, 24 Mich. 456; *Chafee v. Granger*, 6 id. 51; 2 Dillon on Mun. Corp. sec. 968; *Kearney v. Covington*, 1 Metc. 339; *McCullough v. Mayor*, 23 Wend. 460; *Western v. Mayor*, id. 334; Shearman & Redfield on Negligence, sec. 136.

The following points are submitted to show that a tort has been committed:

*First*—The charter of the city of Quincy provides that the city council of said city shall have power to appropriate money and provide for the payment of the expenses of the city. Private Laws, 1857, p. 163, chap. 4, sec. 4.

*Second*—The vesting the power last aforesaid in the city council of Quincy, carried with it the duty, on the part of that city council, to appropriate money and provide for the payment of the expenses of the city, for the failure to perform which an action lies in favor of the party aggrieved, against the city. *Clayburgh v. Chicago*, 25 Ill. 536; *City of Cairo v. Campbell*, 116 id. 309; *Seagraves v. City of Alton*, 13 id. 366;

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Brief for the Appellee.

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*Chicago v. Robbins*, 2 Black. 418; *Bloomington v. Bay*, 42 Ill. 507; *Lansing v. Van Gorder*, 24 Mich. 456.

*Third*—Under the provision of the charter last cited it was not only the duty of such city council to appropriate money, but it was also the duty of that body to audit bills, and to pass any and all ordinances and resolutions, and to do any and all acts and things necessary to give the appellant his money. *Frank v. San Francisco*, 21 Cal. 695; *State v. Cincinnati*, 19 Ohio, 195; *City of Cairo v. Campbell*, 116 Ill. 309.

*Fourth*—Action on the part of Quincy's city council, under such power as that last cited, is not legislative or discretionary, but the exercise of such power by such council is imperative in favor of the party entitled to the money for current expenses furnished. *City of Cairo v. Campbell*, 116 Ill. 309; *Supervisors v. United States*, 4 Wall. 447; *Galena v. Amy*, 5 id. 705; *Commonwealth v. Pittsburg*, 34 Pa. St. 513; *Robinson v. Butts City*, 43 Cal. 354; *Frank v. Supervisors*, 21 id. 695; 2 Dillon on Mun. Corp. sec. 857.

*Fifth*—A duty being imposed on Quincy's council by the chartered provision last cited, and that duty being omitted, and by virtue of such omission a substantial loss of money resulting to said appellant, we have here all the elements of a tort. *Loup v. Railroad Co.* 63 Cal. 99; Underhill on Torts, 4.

The constitutional provision relating to indebtedness does not constitute a defense to an action against a city, though indebted to the five per cent limit, where the action is in tort, brought for the negligence of its agents. *City of Chicago v. Sexton*, 115 Ill. 245; *City of Bloomington v. Perdue*, 99 id. 329; *Bartle v. City of Des Moines*, 38 Iowa, 414; *Rice v. City of Des Moines*, 40 id. 638.

Mr. GEORGE A. ANDERSON, and Messrs. CARTER & GOVERT, for the appellee:

It being conceded that the city could incur no indebtedness to plaintiff, can the city be held guilty of a tort for the failure

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Brief for the Appellee.

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or refusal of the council to make provision for the payment of plaintiff's demands? The substance of appellant's contention is, that because of this constitutional prohibition the city should have paid his bills in cash as they accrued, or else they would become an indebtedness which he would be powerless to collect.

This constitutional prohibition was adopted to protect the tax-payers from extravagant use of municipal funds. It is not a question between contractors and city officials, but is a question that concerns those who have to bear the burdens of government, and whether a constitutional provision designed for their protection, and which forbids the creation of any indebtedness whatever by the municipality, directly or indirectly, for any manner or any purpose, when this limit is passed, can be evaded by the simple process of the officers refusing to pay, "or willfully and maliciously refusing to pay," and thus change what would otherwise be a debt, into a liability for a wrongful and illegal action.

While it may be true that a tort may consist in some act made wrongful because of some obligation created by contract, yet in its general signification the word "tort" implies a wrong independent of contract. It is so defined by the English Common Law Procedure act of 1852. Cooley on Torts, p. 3, note.

If the action of the city council in refusing to pay the plaintiff's alleged claims amounted to a wrong or tort, it was in his discretion to have either sued in case, or to have waived the tort and sued in assumpsit. *Staat v. Evans*, 35 Ill. 455; *Gray v. St. John*, id. 222; *Ives v. Hartley*, 51 id. 520; *Alderson v. Ennor*, 45 id. 128; *Creel v. Kirkham*, 47 id. 344; *DeClerq v. Mungin*, 46 id. 112; *Parker v. Tiffany*, 52 id. 286.

If plaintiff's theory of the action of the city council in refusing to pay the water bills is correct, he must be held to have waived the wrong in bringing his suit in assumpsit. *Benjamin on Sales*, 342; *Story on Sales*, sec. 446; *Kellogg v. Turpie*, 2 Bradw. 55; *Brumbach v. Flower*, 20 id. 219.

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Brief for the Appellee.

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The city is not liable in tort for the failure of the council to pay the alleged claims, for these reasons: First, the city council is a legislative body; second, the contract created a monopoly, and was void; third, the contract was for a long term of years, and was against public policy, and was voidable; fourth, the city had no power to create a debt. *City of Detroit v. Blakely*, 21 Mich. 84.

Now, we deny that the record shows that there was any fault or wrongful neglect on the part of the city council, but we insist that if it did, the corporation can not be held liable, as in tort, for a mere non-feasance of the city legislature,—and this, whether the contract or indebtedness was or was not prohibited. Dillon on Mun. Corp. secs. 91, 482, 949, 964 and note, 966, 1048 and note; *Baker v. State*, 27 Ind. 489; *Morris v. People*, 3 Denio, 381; *Wells v. City of Atlanta*, 43 Ga. 67; *Gillet v. Lyon*, 18 Kan. 410; Thompson on Negligence, 676, 731, 816, note 1.

Public officers whose offices are created by the act of the legislature, as, members of a city council, are not municipal agents or servants. Their neglect is not to be regarded as the neglect of the municipal corporation. And the city is not liable for the non-feasance of its public officers in the performance of their public duties, unless expressly made so by statute. *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368; *Brinkmeyer v. City of Evansville*, 29 Ind. 187; *West Col. Med. v. City of Cleveland*, 12 Ohio St. 375; *Thomas v. City of Richmond*, 20 Wall. 349; Dillon on Mun. Corp. secs. 61, 372; *Gibbs v. City of Beaufort*, 20 S. C. 213; 5 Am. and Eng. Cor. Cases, 428; *Black v. City of Columbia*, 19 S. C. 412; Am. and Eng. Cor. Cases, 640; *White v. Chenbeaster*, 2 Hill, 572; *Coleman v. Chester*, 14 S. C. 290.

A legislative corporation, established as a part of the government of the country, is not liable for a non-feasance by an omission to observe a law of its own, in which no penalty is provided. *Fowler v. City of Alexander*, 3 Pet. 408; 2 Dillon

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Opinion of the Court.

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on Mun. Corp. 949; Boon on Corp. sec. 300; 2 Thompson on Negligence, 675, 818; *Board v. Schroeder*, 58 Ill. 353.

Per CURIAM: This case originated in the circuit court of Adams county, and was there determined adversely to appellant on a general and special demurrer to his declaration. He appealed to the Appellate Court, where the judgment of the circuit court was affirmed, and he now brings the record to this court.

The following opinion was rendered in the Appellate Court for the Third District, by PLEASANTS, J.:

"This was an action on the case, brought by the appellant, against appellee. The declaration contained eleven counts. A demurrer, general and special, to the whole declaration, and to each count thereof, was sustained, and the plaintiff abiding, a judgment of *nil capiat* and for costs was rendered against him, from which he took this appeal. The question is upon the sufficiency of this declaration.

"In the first count it is alleged that the defendant was incorporated by special act, which empowered it, among other things, to appropriate money and provide for the payment of the debt and expenses of the city; that in August, 1873, it passed an ordinance, (set out *in hac verba*,) which was duly accepted by plaintiff, and so became a contract between them, whereby plaintiff was to construct, maintain and keep in operation within the corporate limits of the city, a general system of water works, to be extended and enlarged, from time to time, as therein prescribed; and the defendant was to pay him, in monthly installments, from the time water should be turned on, the sum of \$2600 per annum, and also, in like manner, \$200 per annum for each of the first one hundred hydrants, which contract was, by its terms, to run for a period of thirty years; that the plaintiff fully performed all the things by said contract required of him, and within the time thereby limited for that purpose, and at all times during the fiscal year next

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Opinion of the Court.

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mentioned, had and furnished water through seventy-seven hydrants, on each of which water had been previously turned, and all of which had been located under and pursuant to the provisions of said contract; that the city had a fiscal year of its own, commencing March 31, 1880, and an income and revenue of its own for said year; that at the commencement of said year, and at all times during the same, it was indebted upon its valid bonds theretofore issued and then outstanding and unpaid, to the amount of more than \$1,700,000, which greatly exceeded five per cent on the value of all the taxable property within its limits, as ascertained by the last assessment for State and county taxes made before the commencement of said year, or by any assessment therefor made during said year; that by reason thereof, plaintiff became and was entitled to payment out of the revenue of said year, and the city council ought to have provided out of the same for the payment to him of the contract rate per hydrant specified in said ordinance; that although the city, during said fiscal year, received and used the water so furnished through said seventy-seven hydrants, and its income and revenue during said year was ample and sufficient for such payment in full, nevertheless the city council willfully neglected and refused to appropriate the revenue of said year to or provide for the payment of the amount so due to the plaintiff, but, on the contrary, permitted said revenue to be dissipated, scattered and diverted from the payment thereof, by means whereof the revenue of said fiscal year was lost to the plaintiff, and the amount due him for water furnished to the defendant during said year remains unrecovred and unpaid.

"In this count the duty of the council is alleged to have been to provide for the payment to plaintiff, out of the revenues of the year, the amount of the contract rate for the water furnished during the year. This duty is predicated upon (1) the chartered power of the council to appropriate money and provide for the payment of the debts and expenses of the city;

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Opinion of the Court.

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(2) its express contract with plaintiff, performed on his part; (3) its indebtedness, previously and then existing, to the full limit of its constitutional power to contract indebtedness; and (4) its possession of revenue for that year sufficient for such payment. The breach complained of is its refusal so to provide for payment to the plaintiff, and the appropriation of said revenue to other uses; and the damage or injury to the plaintiff alleged is the non-payment of his claim.

"The other counts, excepting the 9th and 11th, are, in principle and general form, the same as the first, the difference being that some relate to the claims for water furnished during the two following years, respectively. Some aver that an actual though insufficient appropriation was made for the year therein mentioned; some allege the contract as one implied, from the receipt and use of the water, to pay the plaintiff *quantum meruit*; some state the duty as to pay for current expenses *pro rata*, and some charge the refusal to pay as designed and malicious.

"It is not proposed to notice all of the many points discussed and authorities cited by counsel, but only two or three which, in the light of our own State decisions, are deemed decisive of the question here presented.

"At first blush it would seem that by each of these counts it is sought to charge the city in tort for the simple refusal of its council to pay an indebtedness contracted directly in the face of an express constitutional prohibition, and so to recover as damages the precise amount of that indebtedness, with interest from the time when it became due by the terms of the contract. But counsel, as was to be expected, disclaim a position so clearly untenable. Yet this apparent effect of all the facts alleged, is obviated only, if at all, by the introduction into the pleading itself, by inference and as argument, of certain propositions of law touching the effect of the constitutional prohibition upon the contract and claim in question, and the character of the fund called 'current revenue,' which are ad-

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Opinion of the Court.

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mitted to be essential to the sufficiency of these counts. Those propositions are, that the legal effect of the prohibition upon plaintiff's claim was to make it, not non-payable, but payable only out of current revenue, and that current revenue was a specific fund for its payment, and they raise the question we purpose mainly to consider.

"The reasoning in support of them, and which develops the theory of appellant's case more fully, is this: (1) Conceding that appellee had already reached the limit of indebtedness prescribed by section 12, of article 9, of the constitution, the prohibition there contained did not abrogate its charter powers 'to provide the city with water and to erect hydrants and pumps in the streets for the convenience of its inhabitants,' and 'to appropriate money and provide for the payment of the \* \* \* expenses of the city,' or any others, but only forbade that in the exercise of these powers it should contract any further indebtedness; (2) that a city so indebted may nevertheless incur current expenses for police service, lighting the streets, water supply and the like, provided, only, it does not thereby add to its indebtedness; (3) that to contract for such services, if it can pay for them out of current revenue, is not necessarily to add to its existing indebtedness; (4) that under continuing contracts therefor, providing for periodical payments, no indebtedness can arise until the service is rendered up to a period for payment, and if payment is then made, none has been thereby added to that already existing, within the meaning of the prohibition; (5) that being forbidden to contract indebtedness for them directly, or to borrow means of payment, the only resource is the current revenue; (6) that being the only available means of payment, this current revenue is a specific fund for that purpose; (7) that so to apply it is therefore a specific ministerial duty of the council, made all the more clear and binding by its limitation to this means; (8) and that the refusal, neglect or failure to perform such a duty is a municipal tort. Of this series of propositions we hold the third, fourth,

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Opinion of the Court.

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fifth and sixth, which embrace the two previously stated, to be unsound; and if they are so, the seventh and eighth are inapplicable.

"The constitutional provision referred to is, that 'no \* \* \* municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness.' This language leaves nothing for construction, except to ascertain what it is 'to become indebted,' in the sense here intended, for none that could be employed would be more apt to show that upon all such contract liabilities as are within its purview, this provision operates with only one effect, which is to disallow them. It is too plain for argument, that it does not classify them as non-payable and payable-out-of-special-funds, or otherwise, nor change any from being a charge against the city generally, into a charge against its current revenue only, but makes them all alike absolutely non-payable and void. If, then, the contention of counsel, that it so changed the contract and claim here in question, is an admission that they were within its purview, it admits away their case; and if the fact that without that provision it would have been an indebtedness against the city generally, shows it to be so, then that fact, independently of any admission, must also be fatal. It either was or was not within the purview of the inhibition. If not, it was in no way affected by it; if it was, the refusal to pay it, however caused or manifested, could not be a tort.

"We apprehend the real position of counsel to be, that because this claim was properly payable out of current revenue it was not within the inhibition, which is therefore invoked only as further certifying and enhancing the alleged duty of the council to pay it accordingly. But it can not be that the duty referred to was that of anticipating the revenue, and

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Opinion of the Court.

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avoiding liability by assigning the amount required, without recourse, out of a tax already levied for the purpose, as indicated in the *Edwards case*, 84 Ill. 633. It is not averred that any such course was ever requested or suggested by appellant, nor does it appear that its necessity or propriety was apprehended by either party. Another and different one was expressly provided, with his full understanding and assent. In reference to both the \$2600 per annum and the additional sum per hydrant, the language of the ordinance is the same: 'Said city shall pay said Prince, in monthly installments, from the time water is turned on,' etc. (Sections 4 and 7.) Thus the contract was not to provide for payment, but to pay; not out of a particular fund, but absolutely; and the obligation for the delivery of the money was not cast upon its officers, but assumed by the corporation. Failure in duty respecting this claim must therefore consist in failure to pay it according to the contract. So we understand the wrong really charged to be, not in procuring the contract, or its performance without securing or providing for payment in a particular way, but in refusing to pay.

"By its charter the amount of taxes the city could levy in any one year, for all purposes except for interest on its registered bonds, was limited to \$1.03 on the \$100 of the assessed valuation of all the real and personal property therein. (*Binkert v. Jansen*, 94 Ill. 283.) The amount of such valuation, or of the taxes levied, or of the current revenue, in any one year, or how it was applied, or that one dollar was improperly applied except as it was thereby diverted from the payment of appellant's water bills, is nowhere averred. Therefore, the dissipation and scattering of the revenue, as alleged, involved no wrong, unless the payment of appellant was a duty; and so the charge is reduced to a refusal to pay him, which in this case would be a mere breach of the contract in that behalf, unless such payment was a duty specifically imposed by something besides the contract itself, since no other element of a

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Opinion of the Court.

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tort is alleged or discovered in the fact or cause or manner of the refusal,—and hence the importance attached to the fact of the city's existing indebtedness, and the consequent effect, as supposed, of the constitutional inhibition. Thus, the position of appellant seems to be, that the contract, being for current supplies to be furnished continuously for a specified sum per annum, payable monthly, within the amount of current revenue, did not create such a liability on the part of the city as was forbidden, and if the periodical payments provided for had been made when due by its terms, no indebtedness, within the meaning of the constitution, would have arisen, and that his claim became an indebtedness, and therefore non-payable, as such, by the failure to pay it when due, which was wholly the fault of the city council, and is the tort here complained of.

"There is no doubt that the effect of the inhibition was to require the city, indebted as it was, to carry on its corporate operations, while so indebted, upon the cash or pay-as-you-go plan, and not upon credit, to any extent or for any purpose, and the question is, whether the course contemplated by this contract was in accordance with that plan. It clearly did not contemplate any payment in advance, but that a claim against the city would be constantly accruing, payable from month to month, for water previously furnished, 'from the time water is turned on,' and that having been furnished, the obligation to make these payments at the times specified would be absolute, and wholly irrespective of its ability or actual possession at such times, of cash wherewith to make them. Thus some credit was contracted, and not upon the faith of money in hand when performance by appellant was begun, but of money expected to be in hand when it should be completed. And under the charter limitation of the amount of annual taxes to be levied, and the known method of their collection, some risk of its unavoidable extension beyond the fiscal year was necessarily incurred.

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Opinion of the Court.

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"Appellant's claim arose directly upon this contract, as executed *pro tanto*. It was for a specified sum of money thereby agreed to be paid for certain services to be rendered, which were rendered. Had there been no limit to the amount for which the city could become indebted, he could have recovered upon it a general judgment, (*East St. Louis v. East St. Louis Gas Light and Coke Co.* 98 Ill. 415,) and then have had a *mandamus* for the levy and collection of a tax to pay it. (*City of Cairo v. Campbell*, 116 Ill. 305.) In other words, it would have been a proper debt against the city,—a contract liability, which had become absolute for a sum certain in money. Nor is it perceived how it could have been any the less a debt against the city if it had been made payable out of a sufficient current revenue, or any specific fund, or if the city had been all the time possessed of money enough to pay it and all other current expenses, or if it had been actually paid when due. Such payment would have extinguished the indebtedness, but could not have anticipated, prevented or avoided it. That accrued from day to day, as the water was furnished, (*East St. Louis case, supra*, p. 430,) though it was not payable until the end of the month, for there was no default on the part of appellant, nor any failure of any contingency on which his right to the money, under the contract, if it had been valid, depended. Then, if the indebtedness so arising was forbidden, the contract upon which it arose, which expressly contemplated and provided for it, though in itself executory, and creating only a contingent liability, was also forbidden. Prohibition of the end is prohibition of the direct, designed and appropriate means. Being an attempt by the city to put it in the power of appellant, and induce him to acquire an absolute indebtedness against itself, it was, so far as executed, as clearly against the policy and provision of the constitution as the creation of a present debt. If it had not been executed, nor any attempt been made to enforce it or to recover for a breach of it, and so far as it remains unexecuted, of course no such question

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Opinion of the Court.

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could arise. There would be nothing to which the inhibition could apply. *East St. Louis case, supra.*

"In *City of Springfield v. Edwards*, 84 Ill. 632, the court, construing this provision, say it is 'against becoming indebted,—that is, voluntarily incurring a legal liability to pay, in any manner or for any purpose, when a given amount of indebtedness has previously been incurred. \* \* \* A debt payable in the future is, obviously, no less a debt than if payable presently, and a debt payable upon a contingency,—as, upon the happening of some event, such as the rendering of service or the delivery of property, etc.,—is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay when the contingency occurs, the liability is absolute,—the debt exists,—and it differs from a present unqualified promise to pay, only in the *manner* by which the indebtedness was incurred; and since the *purpose* of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses, or for something else.' These general propositions would seem to cover all the material points here involved. But the court went further, and specifically held it unlawful for a city so indebted to incur a liability for current expenses, or anything else, even though it should at the same time (as some of the counts allege it did here) make a formal appropriation, within the limits of the revenue, to meet it; that to avail itself of current but uncollected revenue for such purpose, it must go further, and assign the amount out of a tax actually levied, and without recourse, in such manner as to 'leave upon the city no future obligation, either absolute or contingent, whereby its debt might be increased.' The authorities to the contrary here relied on, from Iowa, California, Ohio and Louisiana, were there considered, and expressly held to be overborne by the plain, broad terms of our constitution. We can not avoid the conclusion, from this decision, that the contract here in question was void, and that the claim

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Opinion of the Court.

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of appellant, whether upon the contract or *quantum meruit*, was not legally payable out of current revenue or otherwise.

"In *Law v. The People*, 87 Ill. 385, that case was approved, and the propositions above quoted were affirmed, the court declaring the inhibition was intended to embrace indebtedness of every description, nature and kind, and in every sense of the term, whatever the character or form by which it was evidenced, when made or issued after the limit should be reached. This leaves no possible ground for the supposed distinction between an indebtedness for current expenses and other accounts, or between one payable out of a specific fund and one chargeable against the city generally. See, also, *Fuller v. City of Chicago*, 89 Ill. 282; *Fuller v. Heath*, id. 296; *Howell v. City of Peoria*, 90 id. 104; *City of Litchfield v. Ballou*, 104 U. S. 190.

"But still more directly, the questions upon which the right to maintain this action depends, seem to us to be *res judicata*. *Prince v. City of Quincy*, 105 Ill. 138, was a suit in assumpit between these same parties, upon the contract, and for the claim here under consideration. The defense pleaded was, in substance, that at the time of making the contract sued on, the city was, and ever since had continued to be, otherwise indebted, in an amount exceeding the constitutional limit. The plaintiff replied, that the several sums of money sought to be recovered 'pertained to the ordinary expenses of the defendant in the administration of the affairs and government of the city, and that at the time of the making of said contract the said several sums of money so provided to be paid monthly by said defendant to said plaintiff, together with other ordinary expenses of the government of the said defendant, were within the limits of the current revenue of said defendant;' and the case was disposed of on demurrer to this replication. It was there contended, on behalf of appellant, that the term 'indebt-edness' did not apply to contracts relating to the ordinary current expenses of a city, payable out of the current revenues, and the Iowa and California cases were cited; but the court

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Opinion of the Court.

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held, that 'to so construe the constitution would be to add a provision in the nature of an exception, which the framers of that instrument did not see proper to insert.' The plea was therefore held good and the replication no sufficient answer to it, the two preceding cases were approved, and the construction therein given was declared to be the result of the 'deliberate and mature consideration' of the court. There it was admitted by the pleading that the parties made this contract; that the plaintiff performed it on his part; that the water supplied was of the ordinary current expenses of the city; that the price agreed on and claimed, and the other current expenses, were within the amount of current revenue, and that the city refused to pay him; and yet he could not recover, because, by reason of its existing indebtedness, the contract sued on and the claim so arisen thereon were prohibited by the supreme law of the State, and therefore void. This case, and another like it, reported in the same volume, at page 215, distinctly hold that the identical claim here in question was a debt added to that already existing against the city in excess of the limit prescribed, and directly within the inhibition. It must follow, that the refusal to pay it when due by the terms of the contract, or at any time afterwards, whether from inability in consequence of the diversion of the revenues to other uses, to its exclusion, or other causes, or from willfulness, could not be a tort. Its payment at that time, out of current revenues or any other fund, or in any way whatsoever, instead of being a duty enhanced or imposed by any law, contract, fact or condition, was absolutely forbidden, and would have been unlawful. There being no duty to pay, the refusal could make no case for *mandamus* or any other proceeding at the suit of appellant, and the case of *Clayburgh v. City of Chicago*, 25 Ill. 536, and others cited to like effect, are not in point.

"But it is said, that under the form of contract here presented there could be no indebtedness until the period for payment arrived, and (if we understand counsel) that had payment been

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Opinion of the Court.

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then made none would ever have arisen, within the meaning of the inhibition. The case of *East St. Louis v. East St. Louis Gas Light and Coke Co.* 98 Ill. 430, is cited as if it modified the decisions above referred to on this point. There it was for the supply of gas light for a long term of years, at a stipulated price per lamp per year, payable in monthly installments; and while the court held, that the price for the whole term was not to be considered an indebtedness incurred on the making of the contract, within the meaning of the constitution, we understand it to have held, that the installments, as they became due, would be, even if they were paid at the time. Its language is: 'Had the contract been performed in compliance with the terms, \* \* \* there would have arisen no indebtedness on the part of the city for more than one month's gas supply.' (Counsel will observe that from the quotation in their brief, at bottom of page 16, two important words are omitted —doubtless through inadvertence.) This, we apprehend, is strictly in harmony with that herein above quoted from the *Edwards case*; and in *Prince v. City of Quincy*, 105 Ill. 143, we have the direct authority of the court itself for saying it does not modify those referred to. A recovery was allowed because the amount accrued and claimed did not increase the city's debt beyond the limit prescribed.

"The argument seems also to be pervaded by a somewhat vague assumption of a distinction between payment and providing for payment, as a basis for the contention that by virtue of the charter power to provide for the payment of the expenses of the city, independently of the contract, or under the contract as claimed to be changed by the inhibition, a duty was devolved upon the council in respect to appellant's claim to take whatever action was necessary to satisfy it when it should become due. That would include the appropriation of money, the levying of a special tax, the auditing of bills, the passage of ordinances and resolutions, the issuing of warrants against the tax levied, without recourse, and any and all other things

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Opinion of the Court.

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required by law to be done before it became due by the terms of the contract, in order to give him the money contemplated by the contract, or that he ought to have. The claim is, that the omission of any such act, resulting in a substantial loss to appellant, constitutes a tort, and it is urged as being entirely consistent with the admission or fact that the claim did become such an indebtedness as was prohibited, and therefore unrecoverable as such.

"It is true, that notwithstanding the indebtedness and the inhibition, the city continued to have authority to provide a water supply, and that it remained under obligation to pay its current expenses, consistently with the constitution. If, however, upon its contracting for proper supplies or services without any express provision as to the mode of payment, the law would imply a duty to take all needful steps to effect it, as intimated in *Law v. The People*, 87 Ill. 400; and if it might so fail to perform as to be guilty of a tort, that, as we have attempted to show, is not the case presented by this declaration, and if it were, it must surely be that this duty could be made unavailable in this form of action, by the consent of the party to whom it would otherwise be owed. How can appellant charge that the city tortiously omitted to assign enough of the uncollected revenue to pay him in such time and manner as to avoid all liability on account of the water supplied, since he expressly agreed to give, and did give, it credit therefor, and looked to it for payment when and after it should become due according to the agreement? This agreement can not be ignored. It is alleged and set forth in each of these counts. It fully shows all the obligation he asked or the city assumed in that behalf. Its performance would have accomplished the same object, but in quite a different manner. His stipulation for and reliance upon its performance was therefore necessarily a consent to the non-performance of the other, which for that reason could be no wrong to him, for it is not pretended that such consent was obtained by the misrepre-

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Opinion of the Court.

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sentation or concealment of any fact, or other fraud on the part of the council. The truth evidently is, that both he and the board that passed the ordinance supposed that the inhibition (if it was in their contemplation at all) would not affect this contract; that the agreement to pay in monthly installments (provided they could be paid, as they became due, out of current revenue,) would not operate to increase the corporate indebtedness; that if each board should pay the bills of its term, as they became due, out of current revenues, or so applied them that at its close no indebtedness for the current expenses thereof would be left unsettled and open against the city, there would be no infringement of it. Of the plausibility or reasonableness of this view there is no need to say more than that our Supreme Court, differing, perhaps, from some others as to like cases, pronounced against it. Being entertained by these parties at the time, however, they innocently provided for and created this monthly debt, and so long as it was held the councils continued to pay it. A later board, coming to doubt its authority, on that ground refused to do so any longer. Still, appellant did not shut off the water, nor propose a new arrangement for its supply, nor go on under any implied promise to pay him *quantum meruit*. On the contrary, he insisted on the validity of the ordinance, and brought suit upon it, although, as he alleges in the eleventh count, on the invitation of the council, and upon the promise that if it should be decided against him the city would pay him for water furnished in the meantime a reasonable price,—which would seem to have been an attempt to create another contingent liability quite as obnoxious to the constitution as the one the council had just repudiated and the Supreme Court afterwards condemned.

"We think this contract for credit, voluntarily made, without fraud on the part of the council or ignorance of any material fact on the part of appellant, estops him to charge that the failure to pay, or make provision for payment, otherwise than

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Opinion of the Court.

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as so agreed, was a wrong. The rule embodied in the maxim *volenti non fit injuria* is, 'that no one can maintain an action for a wrong where he has consented or contributed to the act which occasions his loss.' Broom's Legal Maxims, (2d ed.) 201. And the estopping fact appearing in the declaration may be taken advantage of on demurrer.

"The ninth count, setting out the contract, and averring its performance by plaintiff and payment therefor by defendant for some years, then alleges, that although defendant afterwards discovered it, and notified plaintiff that it would no longer be bound thereby, nevertheless it continued to use the water, without intending to pay and intending not to pay for it. This is likened to the fraud of obtaining personal property under pretense of purchasing, but with the intention not to pay. We think there is a wide difference. Deceit, which is the essence of fraud, is the chief characteristic of that case, but is not even charged in this. These works were established and in actual operation, supplying the city and its inhabitants, under an ordinance which may have been valid as to all or many others of its provisions, though void as to that relating to payment by the corporation. *City of Quincy v. Bull*, 106 Ill. 348.

"Section 17 provides, that 'said Prince shall have the right to make all needful rules and regulations for the government of said works, in all its branches and departments; and no person, except the city council or said Prince, or their properly authorized agents, shall have the right to open or interfere in any way with any fire hydrant in said city, and said city shall have at all times the right to use water from said fire hydrants for the following purposes, and no other, viz., for the extinguishment of fires, for the use, exercise and practice of fire engines, for filling fire cisterns, and other legitimate and proper fire purposes.' Under this provision, duty to persons and property within its limits required the city to use the water for these purposes, notwithstanding its intention not to

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Opinion of the Court.

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pay for it, according to the terms of the ordinance. It is not claimed that it used it for any other, nor that it 'disowned' any other provision of the ordinance than that which was 'disallowed' by the constitution. Duty also required it to disown that, and for so doing it should not be subject to any penalty, forfeiture or restriction of right under other and valid provisions, nor to any unfavorable presumptions or odium that should attach to a willful repudiator. The giving of the notice mentioned was, therefore, an act of frankness and justice to appellant, and not at all indicative of fraud. For aught alleged in this count, it would have agreed to any lawful arrangement, if any had been proposed, for the satisfaction of his claim. The averment of its intention not to pay seems to be an inference from the notice, and, in connection with such notice and disownment of the contract as stated, is to be limited to an intention not to pay under that contract. So, also, for aught that appears, if he had merely acquiesced in the view taken by appellee of that provision, it would have accepted the implications referred to in *Law v. The People*, above mentioned. But, in any case, the count is defective in not averring that any deceit was practiced by appellee, or that appellant was in fact ignorant of any intention it entertained,—that is, it does not expressly charge fraud, and the fact that the city continued to use the water after notice given, and with intention not to pay for it, under the circumstances stated does not necessarily imply or import fraud.

"We have already observed, that the eleventh count avers no more than the breach of another agreement that was also inhibited by the constitution, and not a tort."

The controversy involved in this suit has twice before been submitted to this court in actions *ex contractu*, brought by appellant, against appellee, on both of which occasions we held he could not recover. (*Prince v. City of Quincy*, 105 Ill. 138, 215.) It is sought by this action to avoid the force of those decisions by suing in tort. This can not be done. The de-

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Syllabus.

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murrer to the declaration, and each count thereof, was properly sustained by the circuit court, and we are entirely satisfied with the judgment of the Appellate Court, and the reasons therefor given in the foregoing opinion. Being convinced, after a careful examination of the argument of counsel for appellant, and the authorities relied upon to support this action, that there is no theory upon which either of the counts of the declaration can be sustained, and holding that all substantial questions raised are clearly and correctly disposed of by the opinion of Judge PLEASANTS, there is no occasion for further discussion of the case.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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AUGUST HUESING  
*v.*  
THE CITY OF ROCK ISLAND *et al.*

*Filed at Ottawa May 16, 1889.*

128	465
153	316
<u>128</u>	<u>465</u>
<u>46a</u>	<u>165</u>
128	465
167	72
128	465
178	140
128	465
81a	481
128	465
192	1365
128	465
d202	227
j105a	1308

1. MUNICIPAL CORPORATIONS—*general Incorporation law—powers in general.* A municipal corporation can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

2. SAME—*general and special grant of powers—of the exercise thereof.* An express grant of the power to pass ordinances upon a particular subject, limited, by the terms of the grant, in respect to its extent or objects and purposes, or in reference to the mode in which the power is to be exercised, may be held, unless a contrary legislative intent is manifest, to exclude all authority to legislate upon that subject beyond the prescribed limits.

3. Where there are both special and general provisions as to the power of a city to enact by-laws, as, in respect to health and sanitary matters, the power to pass by-laws, under the special or express grant, can only be exercised in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to

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Brief for the Appellant.

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pass by-laws, under the general clause, does not enlarge or annul the power conferred by the special provisions in relation to their various subject matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority.

4. SAME—*power in regard to sanitary matters—whether it extends to the erection and maintenance of public slaughter-houses.* Paragraph 78, of section 1, article 5, of the general Incorporation law, which declares that cities and villages shall have power “to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease,” does not enlarge the sanitary powers conferred on cities in paragraphs 81 to 84, inclusive.

5. Under paragraphs 83 and 84, of section 1, article 5, power is conferred on incorporated cities and villages to prohibit slaughter-houses, or any unwholesome business or establishments, within the incorporation; and the common council, by appropriate ordinance, may regulate the location of unwholesome business, and they may cleanse, abate or remove the same. But this power does not authorize the passage of an ordinance appropriating public funds for the erection and maintenance of a public slaughter-house.

6. So a city organized under the general Incorporation law, has no power, either express or by implication, to pass an ordinance establishing a city abattoir or slaughter-house, and appropriate the funds or revenue of the city for its erection and maintenance.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Rock Island county; the Hon. JOHN J. GLENN, Judge, presiding.

Mr. IRA O. WILKINSON, Mr. WILLIAM JACKSON, and Mr. CHARLES DUNHAM, for the appellant:

Municipal corporations are limited to the powers expressly conferred or given by necessary implication. All corporate acts beyond the scope of the powers granted are void. To doubt the power is to deny it. 2 Kent's Com. (12th ed.) 288-299; Cooley's Const. Lim. 191-196; 1 Dillon on Mun. Corp. (3d ed.) sec. 89; *Bank of United States v. Dandridge*, 12 Wheat. 68; *Bank of Augusta v. Earle*, 13 Pet. 587; *Railroad Co. v. Harris*, 12 Wall. 81; *Thomas v. Railroad Co.* 101 U. S. 71; *Cook County v. McCrea*, 93 Ill. 236; *People v. Village of Crotty*, id. 180; *City of Champaign v. Harmon*, 98 id. 491.

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Brief for the Appellant.

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But the enumeration of specific acts that may be done as to a particular subject, for the promotion of health or the suppression of nuisances, is, upon a familiar canon of construction, the exclusion of power to do anything further or other, as to that particular subject, to that end; and hence such an enumeration operates as a limitation upon the general power conferred. No other construction can give any meaning or force to the special provisions. 1 Dillon on Mun. Corp. (3d ed.) secs. 396, 316; *Thomas v. Railroad Co.* 101 U. S. 71; *City of Cairo v. Bross*, 101 Ill. 475, and cases cited below.

If the special provisions authorize only wholesome and reasonable acts, as must be presumed, then, under the general power, clearly they might be done without the special provisions. If, then, the only effect of the special provisions is to confer power, (and that, certainly, is all,) they are worse than useless, for that is given by the general provision. If, however, such special provisions are held, under the canon of construction already referred to, to be a delegation of all the power the General Assembly deemed necessary or was willing to grant with respect to the particular and special subjects for the promotion of health or the suppression of nuisances enumerated in such special provisions, then these special provisions become a limitation of the general power for the promotion of health, and so serve an important office, whereas otherwise they serve no purpose whatever. This construction does not do away with the necessity for, or militate against the propriety of, a grant of general power for the promotion of health, etc., but leaves such grant to be exercised for the promotion of health upon the numerous subjects needing regulations to that end, not specially provided for and enumerated in the other provisions of the law. *Mayor v. Linck*, 5 Eng. and Am. Corp. Cas. 393; 12 Lea, 499; *Long v. Taxing District*, 7 Lea, 134; *City Council v. Plank Road Co.* 31 Ala. 76; *Mount Pleasant v. Breeze*, 11 Iowa, 399.

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Brief for the Appellees. Opinion of the Court.

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Mr. WILLIAM McENIRY, City Att'y, and Mr. E. D. SWEENEY, for the appellees:

The city had the right to own and maintain this property as a place for the inspection of meats and animals, and to designate it as a place for such inspection.

The city has the power to build and maintain the abattoir as a public slaughter-house, as a sanitary measure for the suppression of the slaughter-house nuisance, as set forth in the answer, and for the promotion of the health of the city. Rev. Stat. art. 5, chap. 24, sec. 1, pars. 49, 50, 53, 76, 78, 81, 96; *Packing Co. v. Chicago*, 88 Ill. 224.

The law touching health regulations has not been laid down in any case, either in our own State or any other, sustaining the position of counsel for appellant. They are the first to push to the front their oft-repeated statement without authority, except the obsolete and irrelevant *Rumpff case* might be claimed as such, and against the reason and policy of the law. On the other hand, we cite as directly in point, *Packing Co. v. Chicago*, 88 Ill. 282; *Baumgardner v. Hasting*, 8 A. & E. 603; *Railway Co. v. Town of Lake View*, 105 Ill. 207; *Mayor v. Gerspach*, 33 La. 1011; *Hart v. May*, 3 Paige, 213; *Brady v. Insurance Co.* 11 Mich. 425; *Egan v. Chicago*, 5 Bradw. 75; *State v. Knoxville*, 12 Lea, 146; *Daniels v. Hilgard*, 77 Ill. 640; 1 Dillon on Mun. Corp. (3d ed.) secs. 144, 146, 281, 326; *Richard v. Gear*, 8 A. & E. 409; *Spaulding v. City of Lowell*, 23 Pick. 71; *Slaughter-house case*, 16 Wall. 36; *City of Milwaukee v. Gorss*, 21 Wis. 243; *Baer & Co. v. Massoch*, 97 U. S. 28; *McPherson v. Village of Chebanse*, 114 Ill. 46; *Tugman v. Chicago*, 78 id. 405.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by August Huesing, a resident and tax-payer of the city of Rock Island, to enjoin the municipal authorities of the city of Rock Island from main-

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Opinion of the Court.

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taining an abattoir or public slaughter-house, and appropriating the means of the city for that purpose. On the hearing in the circuit court, a decree was rendered in favor of the complainant in the bill, but on appeal to the Appellate Court, the decree was reversed, with directions to the circuit court to dismiss the bill. To reverse the judgment of the Appellate Court the complainant appealed to this court.

The city of Rock Island contains a population of about twelve thousand people, and is organized under the general Incorporation law of the State. The city council procured, by gift, two acres of land in the city, and erected thereon a building where animals might be slaughtered for consumption in the city. On the 7th day of December, 1885, an ordinance was passed. The first section provides that the premises containing the two acres is designated and established as the city abattoir. Sections 2, 3, 4, 5, 6, 7, 9 and 10 of the ordinance are as follows:

“Sec. 2. Said abattoir is established and shall be maintained for the sole use and purpose of so regulating the business of furnishing fresh meats to the inhabitants of said city as reasonably to secure to them good, fresh, wholesome meats.

“Sec. 3. The commissioner of health shall have the care, custody, charge and management of the city abattoir, and it shall be his duty to see that the same is conducted in a clean and orderly manner, and that all the provisions, rules and regulations adopted by the city council for the government and use thereof are enforced, and that the rights and privileges of all persons entitled to use the same are allowed and given, without discrimination or distinction; and in the conduct and management of said abattoir the commissioner of health is hereby authorized and empowered to employ a deputy or deputies, the number and compensation of such deputies to be fixed and determined by the city council.

“Sec. 4. Every person licensed under the ordinances of this city to sell fresh meats shall be entitled to use said abat-

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Opinion of the Court.

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toir, upon compliance with the provisions, rules and regulations governing the use thereof.

"Sec. 5. If any person licensed under the ordinances of this city to sell fresh meats, shall, in the use of said abattoir, refuse or neglect to comply with the provisions, rules and regulations governing the use thereof, the commissioner of health shall suspend such person from further use thereof, and shall forthwith report such suspension and the cause thereof to the city council for its action thereon.

"Sec. 6. Said abattoir shall be open for use for the inspection and slaughter of animals each day from four o'clock A. M. to seven o'clock A. M., and from two o'clock P. M. to eight o'clock P. M., during the period from May 1 to November 1, and from six o'clock A. M. to nine o'clock A. M., and from eleven o'clock A. M. to six o'clock P. M., during the period from November 1 to May 1.

"Sec. 7. Every person licensed under the ordinances of this city to sell fresh meats, of cattle, hogs, sheep, calves or lambs, shall, before offering such meats for sale, have the same inspected and approved by the commissioner of health, or his deputy, at the city abattoir, or at any licensed packing-house or other place in this city licensed for the slaughter of animals; and it shall be the duty of said commissioner of health, in person or by deputy, to inspect meats at said places other than said abattoir at all reasonable hours, and to as fully as possible meet the convenience of persons asking such inspection.

"Sec. 9. All cattle, hogs, sheep and calves, the flesh of which shall be desired to be sold by any person licensed to sell fresh meats within the limits of this city, shall be first inspected by the commissioner of health, or his deputy, at the city abattoir, or at any licensed packing-house or other place in this city licensed for the slaughter of animals, before slaughter thereof, and before such flesh shall be sold or offered for sale by any person so licensed.

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Opinion of the Court.

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"Sec. 10. It shall be unlawful for any person licensed to sell fresh meats, to sell or offer for sale within the limits of said city any fresh meats, (except venison, poultry, fish or wild game,) unless the same has been first inspected and approved by the commissioner of health, or his deputy, as herein provided."

Several questions of a technical character have been raised and discussed in the argument, but in the view we take of the record there is but one question of any importance presented, and that is, whether the city council of Rock Island, under its charter, had the power to pass the ordinance establishing the city abattoir, and appropriate the revenues of the city for its erection and maintenance; and this is the only question which it will be necessary to consider.

Under chapter 24, article 5, of our Revised Statutes of 1874, ninety-six separate and distinct powers have been conferred on the city council in cities, and upon the president and board of trustees in villages. The powers relate to the various wants and necessities which the legislature no doubt supposed should be conferred upon such incorporations, to enable them to preserve order, prevent violations of law, make due and proper regulations to secure the health of the inhabitants, and such other things as pertain to the prosperity and welfare of such incorporated bodies. It will be observed, however, that of the powers enumerated, none, in terms, authorize the construction or maintenance of an abattoir or public slaughter-house by the legislative department of the incorporation, and we find no such express power conferred by any provision of the statute. The city of Rock Island derives its powers, whatever they may be, from the act of the legislature providing for the incorporation of cities and villages, under which it is organized. In *Cook County v. McCrea*, 93 Ill. 236, following the rule laid down by Dillon in his work on Municipal Corporations, it was held, that "a municipal corporation can exercise the following powers: First, those granted in express words; second, those

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Opinion of the Court.

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necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable." There being no provision of the general Incorporation law expressly conferring on the city the power to build or maintain an abattoir, if the power exists, it must be implied in or incident to some of the powers expressly granted by the statute; and it may be conceded, that if the implied power exists, it springs from some one of the specific health powers granted by the act of incorporation. Those powers are as follows:

"Paragraph 12. To provide for the cleansing of the streets, alleys, etc.

"15. To regulate and prevent the depositing of ashes, offal, dirt, garbage, or any offensive matter, in any street, alley, etc.

"40. To provide for the cleansing and purification of waters, water-courses, etc.

"49. To establish markets and market-houses, and to provide for the regulation and use thereof.

"50. To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables and all other provisions, and to provide for place and manner of selling the same.

"53. To provide and regulate the inspection of meats, poultry, fish, butter, lard, cheese, vegetables, cotton, tobacco, flour, meal and other provisions.

"57. To regulate the construction, repairs and use of vaults, cisterns, areas, hydrants, pumps, sewers and gutters.

"75. To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

"76. To appoint a board of health, and prescribe its powers and duties.

"77. To erect and establish hospitals and medical dispensaries, and control and regulate the same.

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Opinion of the Court.

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"78. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

"79. To establish and regulate cemeteries, within or without the corporation, and acquire lands therefor, by purchase or otherwise, and cause cemeteries to be removed, and prohibit their establishment within one mile of the corporation.

"81. To direct the location and regulate the management and construction of packing-houses, renderies, tallow chandleries, bone factories, soap factories and tanneries within the limits of the city or village, and within the distance of one mile without the city or village limits.

"82. To direct the location and regulate the use and construction of breweries, distilleries, livery stables, blacksmith shops and foundries within the limits of the city or village. Also (A 91) to tax and license them.

"83. To prohibit any offensive or unwholesome business or establishment within, or within one mile of the limits of, the corporation.

"84. To compel the owner of any grocery, cellar, soap or tallow chandlery, tannery, pig-sty, privy, \* \* \* or other unwholesome \* \* \* house or place, to cleanse, abate or remove the same, and to regulate the location thereof."

From an examination of these different provisions of the statute, can it, with reason, be said that the power to erect or maintain an abattoir can be implied in or incident to any one of them? We have not, after a careful consideration of the subject, been able to arrive at a conclusion of that character. Surely, there is nothing in the language of either of the powers granted that would lead to the conclusion that the erection of a public slaughter-house by the city was within the contemplation of the legislature in the enactment of these provisions.

But it is claimed that the city has the right to erect and maintain the abattoir under paragraph 53 of article 5 of the Incorporation act, which declares that the city shall have the

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Opinion of the Court.

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power to provide for and regulate the inspection of meats, poultry, fish, butter, lard, cheese, cotton, tobacco, flour, meal, and other provisions. Under this clause, the city of Rock Island had the undoubted power to make reasonable provision for the inspection of meats which may be offered for sale in the city, but an inspection of the ordinance will demonstrate that it is not one of that character. When the different provisions of the ordinance are considered, it is apparent that its true object and scope is to provide a place where all animals shall be slaughtered within the city, under the management, direction and control of the city. In other words, the ordinance provides for the erection and maintenance of a public slaughter-house within the city by an officer of the city. Section 6 of the ordinance provides that the abattoir shall be open for use for the inspection and slaughter of animals each day during the year during specified hours. Section 9 requires all cattle, hogs, sheep and calves, the flesh of which shall be desired to be sold by any person licensed to sell fresh meats within the city, shall be inspected by the commissioner of health, at the city abattoir, or at any licensed packing-house in the city, before such animals are slaughtered. The different provisions of the ordinance, as well as the answer of the city, show, beyond question, that the purpose of the city was not to provide a place for the inspection of meats. It would be placing too narrow a construction on the ordinance in question, and one, too, not authorized by its terms, to hold that it was designed to make provision for an inspection of meats.

But it is said the city has the power under paragraph 78, which authorizes it "to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease," as a sanitary measure. It will, however, be observed that the Incorporation act contains special enumerated provisions authorizing the city council to do certain specified acts for the preservation of the health of the city and the suppression of disease, as respects any offensive

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Opinion of the Court.

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or unwholesome business or establishment which may be conducted or maintained in the city. As has been seen, under paragraph 81 the city council is authorized "to direct the location and regulate the management and construction of packing-houses, renderies, \* \* \* bone factories, soap factories and tanneries within the limits of the city, and within the distance of one mile without the city limits." Under paragraph 82 power is conferred "to direct the location and regulate the use and construction of breweries, distilleries, livery stables, \* \* \* within the limits of the city. Also to tax and license them." And under paragraph 83 power is conferred "to prohibit any offensive or unwholesome business or establishment within, or within one mile of the limits of, the corporation," and under paragraph 84 the city council may "compel the owner of any \* \* \* unwholesome \* \* \* house or place to cleanse, abate or remove the same, and to regulate the location thereof." These are sanitary measures for the promotion of health and the suppression of disease, enacted for that purpose and no other. They provide and determine what may be done by the city council. If a slaughter-house within a city is an unwholesome business or establishment,—and it needs no argument to establish the fact that it is,—it may, by proper ordinance, be regulated—it may be prohibited. Under such circumstances, where there are both special provisions and a general provision relating to the same subject, as is the case here, the question arises, whether the general provision shall enlarge the powers conferred by the special provisions of the statute, or shall the powers specially conferred alone be exercised.

In *State v. Furgeson*, 33 N. H. 427, where a question of this character was under consideration, it was said: "The express grant of the power of legislation upon a particular subject, limited, by the terms of the grant, in respect to its extent or objects and purposes, or in reference to the mode in which it is to be exercised, may be held, unless the contrary manifestly

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Opinion of the Court.

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appears to be the intention of the legislature, upon a view of the entire act, to exclude all authority to legislate upon that subject beyond the prescribed limits. \* \* \* It must be understood that the intention in the insertion of the general clause was to remove the implication which would otherwise arise, to restrain the city from enacting by-laws upon other subjects, and thus to empower them, by virtue of the special provisions conferring express power in the specified cases, to legislate upon those subjects under the limitations prescribed, and, by virtue of the general clause, upon all other matters coming within the scope of their municipal authority."

Dillon on Municipal Corporations (vol. 1, sec. 250, 2d ed.) lays down the rule as follows: "When there are both special and general provisions, the power to pass by-laws, under the special or express grant, can only be exercised in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws, under the general clause, does not enlarge or annul the power conferred by the special provisions in relation to their various subject matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority." See, also, *City of Cairo v. Bross*, 101 Ill. 475.

Under these authorities, which we regard as declaring the correct rule on the subject, we do not think that section 78, relied upon, enlarged the powers conferred by the special provisions.

We have been referred, in the argument, to the "Slaughterhouse case," so called, (16 Wall. 36,) as an authority sustaining the ordinance in question. From an examination of the case cited, it appears that in 1869, the legislature of the State of Louisiana passed an act to protect the health of the city of New Orleans, to locate the stock-landings and slaughterhouses, and to incorporate the "Crescent City Live Stock-Landing and Slaughter-house Company." Under the act, all

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Opinion of the Court.

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animals intended to be slaughtered were required to be inspected and slaughtered at the company's slaughter-house, and all other slaughter-houses within the city were required to be closed. The validity of the act was called in question mainly on the ground that the legislature had no power to pass it; but the Supreme Court of the United States held that the legislature had the power, and that the power was properly exercised. But the decision has no bearing on the question involved in this record. The question here is not what power the legislature has over the subject, or what power it may exercise, but the question is, whether the legislature has conferred the power on incorporated towns and villages organized under the general Incorporation act. We entertain no doubt but the legislature has ample power to authorize an incorporated town to establish and maintain an abattoir, if it saw proper, by appropriate legislation, to do so; but whether that power has been conferred, presents entirely a different question, and one upon which the case cited has no bearing. The legislature, in the exercise of its legislative powers, is unrestrained, except so far as limitations have been prescribed by the constitution of the United States or of the State, while, on the other hand, a municipality can only exercise such powers as have been delegated to it by the legislature.

*City of Milwaukee v. Gross*, 21 Wis. 243, is also relied upon as an authority to sustain the ordinance of the city. The ordinance in the case cited authorized the controller of the city to procure from the owner of a certain slaughter-house in the city the right of all city butchers to use the slaughter-house free of charge, and all persons were prohibited from slaughtering animals at any other place within the city. The question arose as to the power of the city to pass the ordinance, and it was held that the city had the power. But upon an examination of the case it will be found that the statute under which the city acted was much broader than our statute. One clause of the act conferred the power "to direct the loca-

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Syllabus.

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tion and management of slaughter-houses and markets." Under this and other provisions it was said: "These provisions of the charter give the common council ample authority to establish city slaughter-houses, and regulate the management thereof." There is such a distinction between the power conferred in the case cited and our general Incorporation act, that we do not regard the case as an authority. Besides, the ordinance passed in the case cited is very different from the ordinance involved here.

Under paragraphs 83 and 84 of our Incorporation act, heretofore cited, we think power is conferred upon incorporated towns to prohibit slaughter-houses or any unwholesome business or establishment within the incorporation; and the common council of the town, by appropriate ordinance, may regulate the location of any unwholesome business, and may cleanse, abate or remove the same. But such power does not authorize the passage of an ordinance like the one in question.

The judgment of the Appellate Court will be reversed, and that of the circuit court affirmed.

*Judgment reversed.*

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128	478
142	549
144	535
146	491
128	478
150	361
128	478
150	321
128	478
162	130

FRED MYERS

v.

THE UNION NATIONAL BANK.

*Filed at Ottawa May 16, 1889.*

**APPEALS—what questions will arise—on affirmance by the Appellate Court—where the only exception taken was to the rendering of the judgment below.** Where a common law case is tried by the judge, without a jury, and no question is made as to the ruling on the admission or exclusion of evidence, and no written propositions of law are submitted to the court, and the only exception taken is for the rendition of judgment, and the Appellate Court affirms such judgment, the record, on appeal from the Appellate Court, will not present any question for this court, and all it can do will be to affirm the judgment of the Appellate Court.

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Opinion of the Court.

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APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. KERRICK, LUCAS & SPENCER, for the appellant.

Messrs. GREGORY, BOOTH & HARLAN, for the appellee.

Per CURIAM: This was assumpsit, by appellant, against appellee, in the Superior Court of Cook county, to recover the amount of two checks drawn by John R. Snyder upon appellee, and payable to appellant. By stipulation of parties, the cause was tried by the court, without the intervention of a jury. No question arose, upon the trial, in regard to the admitting or excluding of evidence. No written propositions, to be held as law by the court in the decision of the case, were presented to or passed upon by the court, before or at the time of rendering judgment. The court rendered judgment for appellee, to which appellant excepted,—and that was the only ruling excepted to upon the trial. The cause was then taken by appeal to the Appellate Court for the First District, and that court, on hearing, affirmed the judgment of the Superior Court. The case is here by appeal from the last named judgment.

It is quite clear that since the questions of fact are settled by the judgment of the Appellate Court, and no questions of law were raised in the manner provided by the 42d section of the Practice act, no question is presented by the record for our determination. *Bank of Michigan City et al. v. Haskell et al.* 124 Ill. 587; *Mutual Aid Association v. Hall*, 118 id. 169; *Barber v. Hawley*, 116 id. 91; *Christy v. Stafford*, 123 id. 463; *Wrought Iron Bridge Co. v. Comrs. of Highways*, 101 id. 518.

The judgment is affirmed.

*Judgment affirmed.*

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Syllabus.

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EZRA H. STEWART *et al.*

v.

FRANK FELLOWS *et al.*

*Filed at Ottawa April 3, 1889.*

1. TRUSTS AND TRUSTEES—*protecting trust estate—equitable lien in favor of trustee.* The fact that a person becomes the trustee of another, of property bought by taking an assignment of the contract of purchase, to hold the same in trust, will not preclude him from afterward advancing money, at the request of the *cestui que trust*, to prevent a declaration of forfeiture of the contract of purchase; and if the trustee makes such advance with, or even without, the request of the *cestui que trust*, and thereby prevents a loss of the property, he may take the title, with the consent of the *cestui que trust*, and hold it as security for the money so advanced by him, and have an equitable lien on the property therefor.

2. While it may be that a trustee holding the title to a lot in trust for another would be prevented, from his position as such, from demanding that other claims held by him should be tacked on and secured upon the property to the injury of the *cestui que trust*, that would in no wise affect his equitable lien for money necessarily advanced by him to protect and preserve the estate of his *cestui que trust*.

3. RESULTING TRUST—*in favor of a wife—of money loaned to the husband.* Where a wife, after the passage of the Married Woman's act of 1861, loans her money to her husband, she will become simply his creditor, and if the husband invests the money so borrowed in the purchase of land in his own name, no resulting trust will arise in favor of the wife.

4. MORTGAGE—*a transaction treated as such.* Where a purchaser of a lot of ground assigns his contract of purchase to another in trust, and the trustee advances the purchase money, when due, at the request of the *cestui que trust*, to save a forfeiture, and the vendor conveys the title to such trustee, and transfers to him the notes given for the price, by consent of the *cestui que trust*, as a security for the repayment of the sum so advanced, the transaction will, in equity, be treated as a mortgage, and it will not concern the *cestui que trust* to whom the money is decreed to be paid,—whether to the trustee or his devisee.

5. WILL—*devise of land held in security for a debt passes a right to collect the debt.* If a party holding the legal title to land as a security for the payment of moneys advanced for the benefit of the real owner, devises the land, the devise will carry whatever right the devisor had therein, to his devisee.

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Syllabus.

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6. WITNESS—*competency—party to suit, as against one suing as the representative of a deceased person.* Where A transferred his bond for a deed to B, without consideration, thereby making the latter his trustee, and procured B to make payment of the purchase money, and had the vendor convey the property to B, who died, having devised all his estate to C, and the executor of C filed a bill against A and his wife to foreclose the deed as a mortgage, it was held, that A was not a competent witness in his own behalf as to any transaction between himself and B, or to testify in his own interest when called by his co-defendant, his wife.

7. SAME—*credibility—declarations and admissions of one of two parties.* A bought a lot and procured B, his trustee, to advance \$500, the purchase money, and take a deed in his own name. On a creditor's bill against A, he set up the fact that B had advanced the money at his request, and took the title as a security for its repayment. B died, having devised all his property to C, who also died. On bill by the personal representatives of B and C to foreclose A's equity of redemption, filed against A and his wife, the latter set up in defense that the money paid by B was advanced by him to A, and was the money of A's wife, and A so testified in the case: Held, that A's answer to the creditor's bill was competent evidence, as tending to affect the credit to be given to his testimony, his attention having been called to the allegations in the cross-bill.

8. HUSBAND AND WIFE—*husband's right to his wife's money.* Prior to the Married Woman's act of 1861, the husband had the right to reduce his wife's money and personal property into possession, and upon doing so, he would become the absolute owner of the same. A loan of money by a wife to her husband before that act took effect, made him the owner thereof.

9. DELIVERY OF DEED—*a transaction considered.* The holder of the legal title to a lot made a deed to another party, but instead of delivering the same, placed it in escrow in a bank, with this direction over his signature on the envelope containing the deed: "To be delivered in case of my death." Subsequently the grantor revoked the power to deliver the deed, but allowed it to remain with the bank. After the grantor's death the grantee obtained the deed by replevin, and had the same recorded. No intervening rights were acquired: Held, that the case must in all respects be treated as if the deed had remained undelivered.

10. EVIDENCE—*will of deceased party to show transfer of property and claim of ownership.* A party taking the title to a lot as a security for the purchase money advanced, by his will bequeathed and devised the property to F., subject to the condition that in case one S. (the debtor) should, within one year, pay to F. "such principal and interest as shall, at the time of such payment, be due me on an account now open be-

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Opinion of the Court.

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tween us, the principal sum and interest thereon, then I authorize and empower said F. to convey said realty to said S., and in said case I give and bequeath to said F. such sum of money so paid," etc. The testator, in his lifetime, made a deed of the property to the wife of S., and left it with his banker, to be delivered in case of his death. On bill to foreclose S.'s equity of redemption, the court admitted this will in evidence, over the defendant's objection: *Held*, that the will was competent evidence to show complainant's title by the devise, and that it was also competent evidence as tending to sustain the contention that the deed had not been delivered to the wife of S., and was not intended to be delivered except on payment of the open account.

11. *SAME—proof that money paid was that of the trustee paying the same, and not that of the cestui que trust.* A, the purchaser of a lot under a bond for a deed or contract of purchase, assigned his contract to B, who paid nothing therefor, and who gave to A a writing showing he held the property as trustee, for A's use and benefit. When the purchase money fell due, B, the trustee, paid the same to the original vendor, and took a deed to himself, by the consent of A, and also took up A's note given for the price, and retained the same until his death: *Held*, that these facts afforded *prima facie* evidence that the money paid by the trustee was his own, and not that of A, the *cestui que trust*.

12. *INTEREST—on money advanced by debtor's request.* Where A, at the request of B, paid off the note of the latter given for the price of a lot, and, by consent, took the deed from the vendor as security, and also took up B's note, unindorsed, bearing ten per cent interest, and the parties treated the money so paid as an advance on open account, it is error for the court, in finding the sum due from B, to allow any greater rate of interest than six per cent. In such case, B's liability is on an account, and not on the note so paid.

**APPEAL** from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. HALEY & O'DONNELL, for the appellants.

Messrs. OLIN & PHELPS, for the appellees.

**Mr. JUSTICE SHOPE** delivered the opinion of the Court:

The bill in this case seeks to have the deed made by Richards and wife to George M. Leonard, at the instance and request of Ezra H. Stewart, declared an equitable mortgage to Leonard, to secure the payment of certain indebtedness of

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Opinion of the Court.

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Stewart, and to foreclose the same. The circuit court found that said deed was security for the amount due on the \$500 note of Stewart to Richards, but refused to hold that it was security for the indebtedness of Stewart on two other notes given by Stewart to Fellows, and endorsed to Leonard. The appellees, complainants below, make no complaint of this decree.

It is conceded that on October 12, 1870, Stewart purchased of David Richards the lot in controversy, for the sum of \$500, and gave his note therefor to Richards, payable four years after date, and bearing interest at ten per cent per annum, payable annually, and that Richards gave Stewart a written obligation for a warranty deed, to be made on payment of said note according to its legal effect, reserving the right to declare forfeiture for non-payment, and making the time of performance by Stewart, of the essence of the contract. Stewart went into possession of the property, erected a house and made other improvements thereon. February 7, 1873, Stewart assigned this contract of purchase to Leonard, who gave back a written declaration that the assignment was without consideration, and that he held the contract in trust for Stewart, and subject to his order and control; and also gave Stewart his two promissory notes, for \$500 each, without any other consideration than to create an apparent consideration for such assignment, and possibly to afford security for the execution of the trust. On the 13th day of October, 1874, (the day after the maturity of Stewart's note to Richards,) Leonard, under some arrangement with Stewart, paid Richards \$550,—being the amount then due on said note,—and Richards, by the direction of Stewart, conveyed the lot to Leonard, and also delivered to him, without endorsement, Stewart's note given for the purchase money of the lot. This deed and note, and assignment of the contract, together with the other two notes of Stewart given to Fellows, came into possession of the executors of the last will of E. C. Fellows, after the death of both Fellows and Leonard.

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Opinion of the Court.

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The fact that Leonard became the trustee of Stewart in respect of this property, would not preclude him from afterwards advancing money at the request of Stewart, to prevent a declaration of forfeiture by Richards; and if Leonard made such advances with, or even without, the request of his *cestui que trust*, and thereby prevented loss of the property, we see no reason why he might not take the title, with the consent of Stewart, and hold it as security for the money advanced, or why a court of equity should not hold that he would have an equitable lien on the property therefor. It may be that his position as trustee would have prevented him from demanding that other claims held by him should be tacked on, and secured upon the property, to the injury of the *cestui que trust*; but that would in nowise affect the equitable lien for money necessarily advanced by him to protect and preserve the estate of his *cestui que trust*. However, that question does not here arise, for the reason that there was included in the decree only the money advanced, at Stewart's request, to prevent a forfeiture under the Richards contract.

The question of most difficulty is one of fact,—that is, to whom did the money belong with which the payment to Richards was made. The complainants insist that it belonged to E. C. Fellows, who advanced it to Leonard for the purpose for which it was used, while the defendants contend that it belonged to Mrs. Stewart, and was delivered by Stewart to Leonard the day before he paid it to Richards. If the contention of the defendants prevails, a reversal of the decree must follow. If the other contention prevails, the inquiry whether the money belonged to Leonard or to E. C. Fellows is not material. If the money was not furnished by either of the defendants, but was advanced by Leonard at the request of Stewart, and the deed was made by Richards to him, by the consent of Stewart, as a security for its repayment, the transaction will, in equity, be treated as a mortgage, and in that event it will not concern the defendants to whom the

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Opinion of the Court.

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money is decreed,—whether in favor of the estate of Leonard, or that of Fellows.

Upon the theory that the deed is held as a mortgage, we think the decree properly found that the money should be paid to the estate of Fellows. Leonard, by his last will, duly probated, devised and bequeathed the property in controversy to said Fellows, subject to the condition "that in case one Ezra H. Stewart, dentist, now of Joliet, Illinois, shall, within one year from the probate of this will, pay to said Fellows such sum, principal and interest, as shall, at the time of such payment, be due me on an account now open between us, the principal sum and interest thereon, then I authorize and empower said Fellows to convey said realty to said Stewart; and in such case, I give and bequeath to said Fellows such sum of money so paid, absolutely and without reserve." If the property in the hands of Leonard was a mere security for the payment of the money advanced by Leonard for Stewart's benefit, the devise of the land would carry whatever right Leonard had therein, to the devisee.

A point is sought to be made upon the language of the will quoted. It is said that the condition is, that if Stewart shall pay the amount due Leonard on an account now open between them, etc.; and that it is evident no such account existed, and that the executor of the estate of Fellows can have no standing because there was not an account open between Leonard and Stewart. However, if Leonard advanced the money to Richards for Stewart, it is manifest that it was upon open account. No note was taken therefor, nor was the Richards note assigned. Nor is the statement inconsistent with the contention that Fellows in fact furnished the money with which to pay Richards. It is not shown that Stewart had any knowledge of the source from whence Leonard procured the money,—that is, whether he in fact furnished it himself, or whether he got it of Fellows. In the event that Leonard really got it of Fellows, if Leonard advanced the money to Stewart

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Opinion of the Court.

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it would be an open account between Stewart and Leonard. The credit was given, as it would seem, by Leonard, and not by Fellows. As we have seen, there was no assignment of the note by Richards to Leonard, and undoubtedly the account referred to in the will of Leonard was for the money advanced by Leonard to take up said note. It will be unnecessary, therefore, to examine the evidence to ascertain whether Leonard used Fellows' money, or his own, in making such payment.

The fact that Leonard paid the money to Richards, and took a deed to himself by the consent of Stewart, taking up and retaining Stewart's note to Richards, as against the defendants, affords *prima facie* evidence that the money was his. Richards testifies that Leonard paid him the money, and that he deeded the property to Leonard at Stewart's request. If Stewart furnished the money, it would seem strange that Leonard should, by his consent, have taken up the note from Richards and retained it to the time of his death. Frank Fellows testifies, that he and E. C. Fellows came to Joliet on January 13, 1876, which was long after Leonard's death, and that he and Stewart figured the principal and interest then due; that Stewart then wanted his father, E. C. Fellows, to make a deed of the lot to Stewart's wife; that his father replied, he did not care to whom he made the deed if he got his money. He thinks they figured the interest on three notes. He says: "I think two were payable to father, and another was transferred from Richards to father or George (Leonard). \* \* \* I made a memorandum of our figuring at the time I got the \$50 from Stewart. \* \* \* The amount was \$1231.16." Perry J. Hobbs testified, that Stewart told him, in 1876, that he wanted to borrow \$1200 to pay a claim that Fellows had against him; that Stewart explained, that a deed from Mr. Leonard to Mrs. Stewart was in the National Bank, in escrow, and that he wanted this money for the purpose of obtaining that deed. Moreover, Stewart, in his sworn schedule in bankruptcy, shows that he then owed the estate of George M. Leonard, or the estate of

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Opinion of the Court.

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E. C. Fellows, \$1400, for money loaned. It is not shown that there were any other transactions out of which such indebtedness could have arisen, other than the three notes before referred to, which, as we have seen, including the money paid Richards, amounted to only \$1231.16 in 1876. Mrs. F. D. Fellows testified, that after the death of Leonard, and of her husband, E. C. Fellows, she had a conversation with Stewart at the Methodist parsonage in Lockport. She says: "I asked him, 'What did George (Leonard) put that deed he made to you in the bank for?' He said, 'So that when I pay Mr. Fellows I can keep the property.'"

Again, a bill was filed by one Goodspeed to subject this property to the payment of a judgment against Stewart in his favor. Stewart, on January 17, 1876, filed a cross-bill in said proceeding, which was signed and sworn to by him. In this cross-bill he alleges, that on October 12, 1870, he purchased of Richards the real estate in question, for \$500; that he gave Richards his promissory note for the purchase money, payable four years after date, with ten per cent interest; that Richards gave him a contract for a deed, containing a clause authorizing a declaration of forfeiture in default of prompt payment; that he (Stewart) was financially embarrassed and unable to meet the payment, and, fearing a forfeiture, arranged with Leonard to pay Richards the amount called for in the note and contract, and assigned to Leonard the said contract for a deed, by way of security; that on October 12, 1874, Leonard did pay the sum of \$500 to said Richards, he giving Leonard \$50 to pay the interest on said note for the year last preceding, upon payment of which note, Richards made a deed of the premises to Leonard, and that, by agreement, Leonard was to convey the same to him (Stewart) upon his refunding the money so advanced by Leonard to pay off Richards. The introduction of this cross-bill as evidence was objected to, on the ground that Stewart was not the agent of his wife in respect thereof, and his declarations, therefore, were not binding upon her. It

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Opinion of the Court.

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certainly was competent evidence against Stewart, both as an admission against his interest, and also as tending to impeach his testimony given in this cause. Outside of his testimony, there is no direct evidence in the record showing his wife to be the owner of this property, or that she furnished any money with which to pay for the same. There is no pretense that she ever contracted for it, or that Stewart actually conveyed his equities in the property to her. If Stewart was a competent witness, his attention having been called to the allegations of his cross-bill, before referred to, it was certainly competent, as tending to affect the credit to be given to his testimony.

Stewart testified, in his own behalf, that he gave Leonard \$550 of money belonging to his (Stewart's) wife, which he (Leonard) paid to Richards, and that Leonard never paid any money on the lot except what he thus received from Stewart. It was objected that Stewart was not a competent witness to testify in respect of that matter in this cause. Appellees sue as the executors of the last will and testament of E. C. Fellows, deceased, who was the sole devisee or legatee of Leonard. We think it is clear that the defendant Stewart was therefore not a competent witness in his own behalf to testify to any transaction between himself and Leonard. (*Bragg v. Geddes et al.* 93 Ill. 39; *Hurd v. Brown*, 41 id. 125; *Alexander v. Crosthwaite*, 44 id. 359.) Nor was he competent to testify in his own interest when called by a co-defendant. *Whitmer v. Rucker et al.* 71 Ill. 410; *Way v. Harriman*, 126 id. 132.

It is urged, however, that he is a competent witness, first, because he acted as the agent of his wife in all matters relating to this property; and secondly, because this litigation was concerning the separate property of his wife. It is apparent, from what has already been said, that we are of opinion that this lot was not the separate property of the wife. At the time Leonard advanced to Richards the amount due on the note given for the purchase money of this lot, Mrs. Stewart was not

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Opinion of the Court.

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the owner of the lot, and is not shown to have then had any interest therein.

Stewart testifies, that he was married in 1860, and that his wife then had \$1500, which she loaned to him, but at what date is not shown. At the time of such marriage he was entitled to reduce the money and personal property of his wife to possession, and upon so doing would become the owner thereof. A loan of money by the wife to the husband, prior to the passage of the Married Woman's act of 1861, would invest him with the ownership, and she would cease to have any interest therein. If, however, the loan was made after the passage of said act, the wife became simply a creditor of the husband, and if he invested the money thus borrowed in the purchase of land in his own name, no resulting trust would arise therefrom in her favor. When Stewart assigned the contract of purchase to Leonard as a security, he had paid no money of his own, or of any other person, for or on this property, if we except the installments of interest as they fell due on his note. If he intended to place the title of the lot in his wife, it is apparent he never did so. The only conveyance to her was by the deed of Leonard left in escrow in the bank at Joliet. This deed was not made until long after the rights of Leonard had attached, and was never in fact delivered. We do not think Mrs. Stewart is shown to have had an interest in this property, or that Stewart was her agent. He was therefore incompetent to testify to transactions occurring between him and Leonard in respect of his property in the lifetime of Leonard. He was, as a matter of course, competent to testify in respect to the alleged admission and declarations made by him and testified to by other witnesses, and in respect of matters occurring since the death of Leonard and Fellows.

If Stewart's testimony as to the ownership of the money advanced in paying Richards be rejected, as it must, there is but little competent evidence tending to sustain his contention. However, it is insisted there are circumstances proved tending

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Opinion of the Court.

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to sustain that view, one of which is, that Leonard, being in failing health, and intending to visit Colorado, made a deed of the property to Mrs. Stewart, but instead of delivering the same to her, or to any one for her, placed it in escrow in the First National Bank of Joliet, with this direction, indorsed over his signature, on the envelope containing the deed: "To be delivered in case of my death.—George M. Leonard." He returned from Colorado, and revoked the power to deliver the deed, but permitted it to remain with the bank. A plausible argument is based upon this circumstance, and it is insisted that the direction to deliver the deed in case of his death precludes the idea that Leonard could have understood that he held the title as security for the payment of money. It seems strange, if Leonard held the title as a naked trustee, that he did not deliver the deed to the grantee at its execution. No reason is shown for placing it in escrow. It is apparent that Leonard apprehended that he might not return from Colorado, and if it was necessary to protect Mrs. Stewart, no reason is shown why the deed should not have been delivered to her at once. The admissions of Stewart, testified to by Hobbs and Mrs. Fellows, clearly show that long after Leonard's death the deed was still in escrow,—at least, was so regarded by Stewart,—to be delivered when he should pay the sums he owed the Leonard or Fellows estate. It is apparent that the relations existing between Leonard and Stewart were friendly and confidential, and it can be of no importance now whether Leonard expected that the money he had advanced would be paid on the delivery of the deed, or intended a gift to Mrs. Stewart in the event of his death. As we have seen, after his return from Colorado, Leonard revoked the power of delivery with which he had invested the cashier of the bank, and subsequently devised the property in controversy, subject to the condition before mentioned, to Fellows. In 1876 Mrs. Stewart made a demand on the bank for this deed, and on its refusal to deliver it to her, obtained possession thereof by replevin,

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Opinion of the Court.

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and immediately placed it on record. This was after Leonard's death, and after the revocation of the direction to the bank to deliver it in case of his death. It was perfectly competent for Leonard to revoke the direction to deliver the deed, as was done. The placing of the deed on record, under the circumstances, impaired no right of complainants, no intervening rights having accrued, and the case must, in all respects, be treated as if the deed had remained undelivered.

The will of Leonard was objected to as incompetent as evidence. While it would not be competent evidence, and could not be considered as tending to establish Stewart's indebtedness to the testator, it was clearly competent for the purpose of showing Fellows' right of property, or, in other words, that whatever right Leonard had in respect of this property passed to Fellows, and upon his death, to complainants. If it was established that Leonard owned the premises in controversy in fee, or held the same as security for the payment of money, it was competent, by any legitimate evidence, to show that his right and title therein had become vested in complainant's testator. Nor are we prepared to say that this evidence was not competent to be considered, as tending to sustain the contention of appellees that the deed to Mrs. Fellows had not been delivered, and was not intended to be delivered by Leonard except upon the payment of the account open between himself and Stewart.

We are of opinion, however, that the decree is for too large a sum. It appears, from the evidence, that Leonard paid Richards \$550, that being the amount then due on Stewart's note, and it also appears that afterwards Stewart paid Frank Fellows \$50. We also think, while it is by no means clearly established, that \$50 of the \$550 paid Richards came from Stewart, and that \$500, only, was advanced by Leonard. There was no assignment of the note by Richards to Leonard, and the whole case proceeds upon the theory that the money was advanced by Leonard to pay off and discharge the Richards

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Opinion of the Court.

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debt. The transaction was simply the advance of money by Leonard for the use of Stewart, and although the note taken up from Richards was retained by Leonard, it is evident, we think, that it was regarded by the parties, and was, in fact, money due on account from Stewart to Leonard. Indeed, the clause in the will of Leonard before referred to, where he speaks of the money "due me on an account now open between us," can, in the light of the circumstances here shown, relate to nothing else than the money thus advanced. It is not shown that there was any direction given by Stewart as to the application to be made of the \$50 paid to Frank Fellows, and it appearing that Stewart was indebted to Fellows upon the two other notes mentioned, we are unable to determine whether that sum should be credited upon the amount here in controversy or not. The evidence fails to show how it was in fact applied by Fellows, for although no direction was given by Stewart, if applied by Fellows upon this claim, Stewart should receive credit for it here. The court allowed interest at ten per cent per annum, from October 13, 1874, to the date of the decree. This was error. There was no proof of an agreement upon the part of Stewart to pay interest, and it follows, that but six per cent interest should have been allowed.

For this error the decree of the circuit court and the judgment of the Appellate Court are reversed, and the cause remanded to the circuit court, with directions to enter a decree foreclosing said deed, as a mortgage, for the amount advanced by Leonard as here found, with six per cent interest per annum thereon, deducting payments, if any are shown to have been made. It is ordered that each party pay the costs respectively made by them in the Appellate Court and in this court.

*Judgment reversed.*

Mr. JUSTICE BAKER, having passed upon this case in the Appellate Court, took no part in its consideration here.

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Syllabus.

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JAMES M. STREAN *et al.*

v.

MARY LOUISE LLOYD *et al.*

*Filed at Ottawa May 16, 1889.*

1. **EJECTMENT—attorney's authority—to institute and prosecute the suit.** Under the statute, any written recognition of the attorney's authority to commence an action of ejectment, duly proved as therein provided, is made presumptive evidence of such authority at the time the suit was brought.

2. Where a written recognition of an attorney's right to prosecute an action of ejectment for lands situate in one county, inserts the name of another county as the place where the suit is to be prosecuted, the naming of the wrong county will be regarded as a clerical error, and will be rejected as meaningless. Authority to prosecute such a suit necessarily implies authority to prosecute it in the county where the land lies.

2. **SAME—amendment of declaration—in ejectment.** The circuit court has authority, under section 23 of the Practice act, to allow the plaintiff in ejectment to amend the declaration by changing the parties and correcting the description of the land sued for.

4. **SAME—sufficiency of evidence—as to extent of recovery.** Proof of title in A and B, and a conveyance from B to C, and a deed of trust from C to D, and his death, leaving the plaintiffs his only heirs, will not sustain a judgment in ejectment in favor of the plaintiffs for the entire interest in the land. At most, such evidence shows a right of recovery only of the undivided half of the land.

5. **SAME—remittitur in Supreme Court—and entry of judgment for the proper quantity.** Where judgment is rendered on the first trial in an action of ejectment for a tract of land, on proof of title to only an undivided half in the plaintiff, this court will not allow the plaintiff to enter a remittitur, and take judgment for the undivided half of the land.

6. **APPEALS—reviewing facts—in ejectment.** On an appeal in an action of ejectment, this court must review questions of fact as well as of law, when properly presented.

7. **LAW AND FACT—as to effect of a deed.** The effect of a deed is a question of law for the court; but whether there is an instrument purporting to be a deed conveying a particular tract of land, is a question of fact.

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Brief for the Appellants. Opinion of the Court.

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APPEAL from the Circuit Court of Iroquois county; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. KAY & EUANS, for the appellants:

The true question was, whether the attorney had authority to commence the suit, and not whether the plaintiffs afterward approved of what had been done. *Frye v. Calhoun County*, 14 Ill. 132; *Kankakee v. Railroad Co.* 115 id. 90; 11 id. 488; Weeks on Attorneys at Law, p. 351, sec. 200.

The court erred in allowing the amendment of the declaration bringing new parties and describing different lands; also in giving judgment of the whole premises in fee to the heirs of Walker. *Lowe v. Foulke*, 103 Ill. 59.

Mr. WILLIAM J. AMMEN, and Mr. GEORGE F. HARDING, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was ejectment, in the circuit court of Iroquois county, by Mary Louise Lloyd, Josephine Walker and Carrie Walker, for the recovery of the north-west quarter and the west half of the south-west quarter of section 27, in township 25 north, range 12, east of the third principal meridian, in Iroquois county. Judgment was rendered for the plaintiffs, for the lands described, in fee, and the defendants appeal to this court.

It is objected that the court below erred in not dismissing the suit, because the plaintiffs' attorney failed, in response to a rule of court laid upon him to that effect, to produce authority for commencing the action in the name of the plaintiffs therein. Under the statute, any written recognition of the authority to commence the suit, duly proved as therein provided, shall be sufficient presumptive evidence of such authority. (Rev. Stat. 1874, p. 445, sec. 16.) There was, here, produced such written recognition of authority, and there was nothing to disprove the effect thus given it by the statute. It

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Opinion of the Court.

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is not, as counsel seem to suppose, evidence merely that there was authority, when that recognition in writing was executed, to prosecute the suit, but the statute makes it presumptive evidence that authority existed to commence the suit at the time it was commenced. The name of the county of Cook is inserted as the place where suit is to be prosecuted; but this is evidently a mere clerical error. Suit could only be commenced in the county where the land lies,—in Iroquois county,—and authority to prosecute the suit necessarily implies authority to prosecute it there. The words, "Cook county," should be rejected as repugnant and meaningless.

We are also of opinion that the objection urged on account of the court allowing the plaintiffs to amend the declaration by changing parties and correcting the description of the land sued for, is untenable. The amendments made were clearly within the power conferred upon the court by section 23 of the Practice act. Rev. Stat. 1874, p. 778.

It is unnecessary to consider other question of law presented by objections discussed in the printed arguments before us, since they may not arise upon the second trial of the case.

The judgment below must be reversed, because it is not sustained by the evidence. Plaintiffs proved *prima facie* title in James W. Gaff and Thomas Gaff, then conveyance of one undivided half by Thomas Gaff and wife to George K. Clark, and finally deed of trust by George K. Clark and wife to Sidney P. Walker, as whose heirs-at-law these plaintiffs sue. They show no other title to the land. This is not determined merely by weighing the evidence and ascertaining where, in our opinion, is the preponderance. It is the only case which plaintiffs' evidence tends to establish. In any view, therefore, all that these plaintiffs were entitled to recover is the undivided half of the lands described in the declaration.

But it is suggested that inasmuch as this case was tried by the court, by agreement of the parties, without the intervention of a jury, and no propositions of law were submitted to

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Syllabus.

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be held, the sufficiency of the evidence to sustain the judgment is not before us. We can not concur in this view. This case comes directly to this court from the trial court, and so we must review questions of fact as well as questions of law, when properly presented. The effect of a deed is a question of law, but whether there is an instrument purporting to be a deed conveying a particular tract of land, is a question of fact; and it is a fact that the deed in trust to Sidney P. Walker only purports to convey an undivided half of the land, and hence the evidence fails to sustain the judgment.

Counsel for appellees, however, ask leave to enter a *remititur* in this court as to the one undivided half of the land; but this appeal being from a judgment rendered on the first trial in an action of ejectment, we have held that is not admissible. *Lowe v. Foulke*, 103 Ill. 58.

The judgment is reversed, and the cause is remanded to the court below for a new trial.

*Judgment reversed.*

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THE PEOPLE *ex rel.* Charles E. Barber, Collector,

v.

CHARLOTTE E. CHAPMAN *et al.*

*Filed at Ottawa May 16, 1889.*

1. DRAINAGE LAW—giving credit for old drains—at what time allowance to be made—remedy of land owner. Section 22 of the Drainage act authorizes the commissioners, where an old drain has been in whole or in part constructed, and such work can be advantageously utilized, to estimate the value of such old ditch, and allow the owner proper credit for the same, on making an assessment for drainage purposes. But this can not be done after the commissioners have made their assessment and filed the assessment roll with the town clerk.

2. If the commissioners allow a land owner for ditches or drains previously made, and used by them, this must be done when they make the assessment, under section 26 of the act, and the amount they then

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Brief for the Appellant.

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allow may be credited on the assessment. If the land owner is not satisfied with the amount allowed him as a credit and deducted from his assessment, he may appeal, under section 27 of the act. It is not competent for the county court, on application for judgment, to allow any credit for prior drains used by the district.

3. *SAME—filing assessment roll—as concluding authority of commissioners.* After the assessment roll has been made and filed with the town clerk, the commissioners will have no power over it, the matter having thereby passed beyond their jurisdiction. If errors exist needing correction, the party aggrieved will have a remedy by appeal.

APPEAL from the County Court of Iroquois county; the Hon. G. G. BOVIE, Judge, presiding.

Messrs. HARRIS & HOOPER, and Mr. R. W. HILSCHER, for the appellant:

The commissioners of highways of each town are made drainage commissioners. Drainage act, 3 Starr & Curtis' Stat. p. 208, sec. 1.

Commissioners of highways may hold special meetings at the call of the president or any two commissioners, and no official business shall be transacted except at a regular or special meeting. Road and Bridge act, 2 Starr & Curtis, p. 2139, sec. 10.

The town clerk is made clerk of the drainage commissioners, and is required to keep a book known as the drainage record, in which he shall enter at length findings and orders of the drainage commissioners pertaining to the subject of drainage. Drainage act, 3 Starr & Curtis, p. 208, sec. 2.

When it shall appear to commissioners that a drain or ditch has been in whole or in part previously constructed, etc., and such work can be advantageously utilized, they may estimate the value of the old ditch, and allow the owner proper credit for the same. 3 Starr & Curtis, p. 214, sec. 22.

The tax list shall show the balance of tax over credits or damages, or credits over tax, showing the amount due the district or land owner, as the case may be. 3 Starr & Curtis, p. 215, sec. 26.

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Brief for the Appellees.

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An appeal may be taken within ten days after the list is deposited with the town clerk, only on the ground that the tax is greater than the benefits. 3 Starr & Curtis, p. 215, sec. 27.

The commissioners may use money belonging to the district for the purpose of compromising suits and controversies arising under this act, etc., provided the acts of the commissioners shall be uniform as to the rights of all persons and property. 3 Starr & Curtis, p. 218, sec. 38.

There was no meeting at which the commissioners could legally transact business at Olm's drug-store, because notice to the third commissioner, of the meeting, was necessary, and was not given. Dillon on Mun. Corp. (1st ed.) secs. 200-202; *School Directors v. Jennings*, 10 Bradw. 643.

The statute requires a record of all proceedings of the commissioners relative to drainage, to be made by the clerk. The meeting at Olm's drug-store was not considered a meeting of the board. No record was kept, and parol evidence to establish an agreement is not permissible. *Town of Old Town v. Dooley*, 81 Ill. 258.

Messrs. KAY & EUANS, for the appellees:

By section 22 of the Drainage act, when a previously constructed drain is taken and used by the commissioners, they may estimate the value of such old ditch, and allow the owner proper credit for the same. By section 26 the commissioners are required to make out a special assessment roll, setting down in separate columns the owner's name, etc., and the damages allowed, if any, or any other credit to be given to the owner. By section 27 an appeal is given to the county, but the appeal shall be upon the ground, only, that such tax exceeds the benefits to accrue to the land.

If it be admitted that the credit should have been made on the assessment roll, we still contend that the commissioners retain jurisdiction of that roll until the expiration of ten days

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Opinion of the Court.

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from its filing with the town clerk. *Turley v. People*, 116 Ill. 433.

What power or jurisdiction has the county court in granting the relief asked by appellees? Upon this question, we think any defense can be made which shows that the assessment, or any part thereof, ought not to be collected. *City of Chicago v. Burtice*, 24 Ill. 489; *Pease v. City of Chicago*, 21 id. 500; *Create v. City of Chicago*, 56 id. 423.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was an application by the county collector of Iroquois county for judgment against lands, to satisfy a special assessment levied by Danforth Drainage District No. 3, in the year 1886. Appellees, who were the owners of lands in the district, appeared in the county court and filed several objections to the application for judgment, and the court, upon the evidence introduced in support of the objections, allowed a rebate of \$400 from the amount assessed against appellees' lands, and rendered judgment for the balance. To reverse the judgment of the county court, the collector appealed.

The drainage district in question was organized under the act of 1885, and appellees' lands were classified according to section 21 of the act, and no appeal was taken. The commissioners of the drainage district made an assessment as authorized by section 26 of the act, and no appeal was taken from the assessment. It appears, however, from the evidence introduced on the trial, that before the district was organized, appellees had constructed, on their own lands, certain ditches, which were, in part, at least, used by the drainage district, and after the assessment in question had been made, and after the assessment roll had been filed with the town clerk by the commissioners, appellees, before the time for an appeal from the assessment had expired, made application to the commissioners for a credit on the assessment for the ditches thus

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Opinion of the Court.

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appropriated. Section 22 of the act authorizes the commissioners, where an old drain has been in whole or in part constructed, and such work can be advantageously utilized, to estimate the value of such old ditch and allow the owner proper credit for the same; but nothing was allowed appellees by the commissioners for the ditches they had constructed on their lands. The commissioners of highways, who are, under the act, drainage commissioners in their respective towns, when appellees made application for an allowance on the assessment,—thinking, no doubt, that they ought to have relief in some manner,—agreed to meet at Olm's drug-store, (the office of the town clerk of the town,) for the purpose of adjusting the matter. A meeting was held, two of the commissioners, the town clerk, appellees and some other parties being present. The parties do not, however, agree in regard to what occurred at that meeting, and as no record of the proceedings was kept, the action taken is not entirely free from doubt. The clerk thinks that what was done could not be regarded as a meeting of the commissioners,—that no definite promise was made to do anything for Chapman. But he is not corroborated by the other evidence. From the evidence of the commissioners, of Chapman, and of the civil engineer of the district, it is manifest that the commissioners agreed to allow Chapman \$400 on his assessment. But while we think the evidence discloses that the agreement was made, at the same time we are of opinion the commissioners had no authority to make an agreement of that character, and the agreement was void. As heretofore observed, before this meeting was held the commissioners had made the assessment and filed the assessment roll with the town clerk. After an assessment roll had been made and filed with the town clerk, the commissioners had no power or control over it,—the matter had passed beyond their jurisdiction. If errors in the assessment existed which ought to have been corrected, the party aggrieved had a remedy by

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Opinion of the Court.

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appeal, but no power to review the assessment has been conferred on the commissioners, and in the absence of authority in the statute, their action was a nullity, as those officers have no powers except those conferred by the statute.

The position is, however, taken, in the argument, that appellees have a valid claim for the amount expended on the ditches, and when application is made for judgment against their lands to pay an assessment, whatever amount may be due them may be set off against the amount assessed against their lands. We do not concur in this view. The credit appellees may be entitled to receive arose under section 22 of the act, and the amount of the credit must, by the terms of the section, be determined by the commissioners. This may be done when the commissioners make the assessment, under section 26 of the act, and whatever amount they may allow may then be credited on the assessment. If the land owner is not satisfied with the amount allowed him as a credit and deducted from his assessment, he may appeal, under section 27 of the act. In this way the amount the land owner should be allowed on his assessment may be settled and determined. But we do not think it was contemplated by the legislature that the county court, on application for judgment against lands to pay a special assessment ordered by a drainage district, should enter upon the investigation of the amount an owner of an old drain or ditch should receive for the same on his assessment.

We think the court erred in allowing \$400 in favor of appellees. The judgment will be reversed and the cause remanded.

*Judgment reversed.*

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Syllabus.

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J. MARION FORT, Admr.

v.

CORNELIA P. RICHEY, Admx.

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128 502  
180 282

*Filed at Ottawa May 16, 1889.*

1. CONVEYANCES—*separate contract as to payment—the deed and contract construed together.* A father conveyed his farm to his son on July 30, for the expressed consideration of \$5000, of which one-half was paid down. On the 5th of August following, the son gave the father, for the balance due, his obligation to pay the latter \$175 per annum during his life, and as much more as might be necessary to the father's support and comfort, containing a proviso, however, that the total of such payments or advances should not exceed \$2500, and interest thereon: *Held,* that the contract of the son, and the deed to him, though bearing different dates, were parts of the same transaction, and should be construed together, as they both related to the same subject matter, and were based upon the same consideration.

2. SAME—*contract as to payments—construed—as to liability being discharged after payment in part.* A father conveyed land to his son for the expressed consideration of \$5000. The son paid \$2500 in cash, and gave his written agreement to pay the father, as an annuity, the sum of \$175 during the life of the latter, and such further sums as might be necessary to minister to his comfort or satisfaction, but it was therein provided that the total of all such payments and advances should not exceed \$2500, and interest thereon. The yearly payments were made during the father's life, amounting to \$1410: *Held,* that the son was not liable to the father's estate for the balance of the \$2500, or purchase price, and that his liability was discharged by performance of his written agreement to pay the annuity during his father's lifetime.

3. SAME—*consideration—as expressed in the deed—whether conclusive.* A deed, by expressing a consideration, does not necessarily import that such sum is to be paid by the grantee to the grantor in any event, so as to fix an indebtedness independent of a contemporaneous agreement of the parties fixing the mode of payment and determining the amount which shall ultimately be paid. It is competent for the parties to agree upon a different consideration, or to agree that the consideration recited in the deed shall be payable only conditionally, and if they do so, and reduce their contract to writing, the same conclusive presumptions will arise as in other cases,—that all the terms of their contract are embodied in the writing.

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Brief for the Appellant.

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APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Henderson county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. KIRKPATRICK & ALEXANDER, for the appellant:

The only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantee. For every other purpose it may be varied by parol. Wharton on Evidence, 1042, and note.

When it was shown that half the consideration was not paid in money, and that in respect to it there existed a written contract, that was an end of the claimant's case. A written contract can not be varied by parol. *Gardt v. Brown*, 113 Ill. 475.

It is the duty of courts, in construing contracts, to discover and give effect to the intention of the parties. *Field v. Leiter*, 118 Ill. 17; *Wilson v. Roots*, 119 id. 379.

Courts have no right to make a contract, either by rejecting some of its provisions or by adding new ones, nor by placing upon its provisions an arbitrary construction. *Welsch v. Savings Bank*, 94 Ill. 191.

In the interpretation, we ought not to deviate from the common use of the language. *Potter's Dwarris*, 127.

In seeking the intention of the parties to a written contract, the courts are not authorized to construe the words used otherwise than in accordance with their plain, natural and obvious meaning, unless, from a consideration of the entire evidence, it shall appear that the parties did not intend to so use them. *Manufacturing Co. v. Cook*, 16 Bradw. 161.

The son saw that the wants and comforts of the old gentleman might reach such a sum as would bankrupt him or his estate. So, then, there were three matters that required attention: First, that \$175 per year was to be paid in any event; second, if that was not sufficient for the necessities and comfort of the old gentleman, then such additional sums as might

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Brief for the Appellee. Opinion of the Court.

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be required was to be paid; third, it was possible that these wants and necessities might become a greater burden than the son was willing or able to bear. So, in order to avoid trouble in that direction, a limit,—a maximum sum beyond which he could not be required to pay,—must be fixed.

Messrs. GRIER & STEWART, for the appellee:

The recital in the deed *prima facie* proves the consideration to have been \$5000, and in the absence of other competent proof, the law presumes that this consideration was to be paid in money on the delivery of the deed.

The deed was proper evidence to show the purchase of the land, and the amount to be paid therefor, and the oral evidence was proper to show the consideration to be paid for the land, and to contradict the recital of payment in the deed.

That we had a right to make this oral proof, seems to be admitted by counsel and substantiated by their authorities, when they say, in their argument, "The amount of consideration, and its receipt, are open to explanation by parol proof in every direction." In addition to the authority referred to by them, we would refer the court, on the same point, to the following: *Ayers v. McConnel*, 15 Ill. 230; *Kimball v. Walker*, 30 id. 482; *Jones v. Buffum*, 50 id. 277.

There is nothing in the contract of August 5, 1881, showing an intention to release any portion of the purchase price of the land.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

Cornelia P. Richey, administratrix of the estate of Richard W. Richey, deceased, filed in the County Court of Henderson county a claim against the estate of Thomas G. Richey, deceased, for the unpaid balance of the purchase money of certain lands sold and conveyed by Richard W. Richey to Thomas G. Richey in their life time. Said claim was contested by the administrator of Thomas G. Richey, and on trial in that court

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Opinion of the Court.

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the sum of \$1547.60 was allowed to the claimant. On appeal to the Circuit Court the claim was disallowed, but on a further appeal to the Appellate Court the judgment of the Circuit Court was reversed and the cause remanded to that court for a new trial. Another trial was thereupon had in the Circuit Court before the court without a jury, resulting in a finding and judgment in favor of the claimant for \$1750. This judgment was affirmed on appeal by the Appellate Court, and by a further appeal the record is brought to this court.

At the trial the following facts appeared: Thomas G. Richey was a son of Richard W. Richey. On the 30th day of July, 1881, Richard W. Richey and wife executed a deed to Thomas G. Richey conveying to him certain lands, said deed reciting that the conveyance was made "for and in consideration of five thousand dollars in hand paid." It seems to be conceded that \$2500 of the consideration was paid at the time. For the remaining \$2500 Thomas G. Richey executed and delivered to Richard W. Richey the following agreement:

"KIRKWOOD, ILLS., Aug. 5, 1881.

"For a valuable and sufficient consideration, I hereby agree, binding my heirs and executors or administrators to the same, to pay R. W. Richey one hundred and seventy-five dollars, on the fifth day of August of each year during his natural life.

"Should said annual payment prove insufficient for the necessities, wants or comfort of the said R. W. Richey, I, by these presents, bind myself and heirs to advance such additional sums of money as may from time to time be required or necessary to supply all such wants, or to in any way minister to his comfort or satisfaction: Provided always, and this pledge is made on condition that the sum total of all such advances and payments shall not exceed the amount of interest and principal of twenty-five hundred dollars. Interest commencing on same Aug. 5, 1881, and reckoned at the rate of seven per cent per annum.

THOMAS G. RICHEY."

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Opinion of the Court.

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In addition to the deed and agreement, evidence was introduced on behalf of the claimant of certain statements made by Thomas G. Richey in his life time and subsequent to the date of the agreement as follows: John Marshall, a brother-in-law of Richard W. Richey, testified: "Thomas told me that he had purchased the two eighties and that he was to pay \$5000 for them. He said that \$2500 of the money was left in his hands to be paid to his father as it might be necessary. He said they had a contract about it, but did not tell the nature of the contract. He spoke to me several times about paying money on it. He said they thought the money would be safer in his hands than with his father; that his father might spend it faster than necessary if he had it. He said it was to be paid to him from time to time as he might need it. I had one of these conversations with Thomas about a month or six weeks before he died. He said he thought he had paid about \$1400 or \$1500 on the contract." On cross-examination the witness said: "Thomas said he had a written contract with his father in regard to the matter. Have seen the contract since R. W. Richey died. This is the contract," (referring to the contract above recited). Edward Richey testified that Thomas G. Richey told him that he had purchased the farm and agreed to pay his father as he needed it; "that he thought it best to get it fixed up as his father was getting frail. He said he thought it best for him to keep the money for him, as he might spend it if he got it."

It was proved that Thomas G. Richey died in December, 1885, and that he had then paid on the contract with his father the sum of \$1410.60. After his death, and prior to the death of his father which occurred in February, 1886, his legal representatives paid on said contract the sum of \$156.25.

The foregoing being all the evidence, the defendant's counsel submitted to the court the following propositions to be held as the law in the decision of the case which the court marked "refused," viz.:

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Opinion of the Court.

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1. "The court finds that the sole and only cause of action in this case is upon the contract in evidence, dated August 5, 1881.

2. "As a matter of law, the court holds that, under the contract in this case dated at Kirkwood, Ill., August 5, 1881, signed by Thomas G. Richey, said Thomas G. Richey, his heirs, executors or administrators, were not bound to pay said R. W. Richey more than \$175 per year, or if that should prove insufficient, then such additional sum or sums of money as might from time to time be required or necessary for the wants, comfort or satisfaction of said R. W. Richey.

3. "As a matter of law, the court holds, that under the contract in this case, dated August 5, 1881, signed by Thomas G. Richey, neither he, the said Thomas G. Richey, nor his heirs, executors or administrators, were bound to pay any sum whatever after the death of said R. W. Richey, unless during his life said Thomas G. Richey or his heirs, executors or administrators, should fail to pay said sum of \$175 per year, or a sum sufficient for the necessities, wants or comforts of said R. W. Richey during his life."

By these propositions the proper construction to be placed upon said contract, and the liability of the estate of Thomas G. Richey under the evidence, are directly presented as questions of law, and those questions are therefore open for consideration in this court.

First, then, does the evidence tend to establish any liability on the part of Thomas G. Richey or his estate apart from and independent of the contract? It can not be doubted that the contract and deed are parts of the same transaction, and that they should therefore be construed together. True they bear different dates, the deed being dated July 30 and the contract August 5, but both relate to the same subject matter and are based upon the same consideration, the contract being given in consideration of \$2500 of the purchase money named in the deed. The deed, by expressing a consideration of \$5000, did

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Opinion of the Court.

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not necessarily import that that sum was to be paid by the vendee to the vendor in any event, so as to create an indebtedness existing independently of their contemporaneous agreement fixing the mode of payment, and determining the amount which should be ultimately paid. It was competent for the parties, notwithstanding the recital in the deed, to agree upon a different consideration, or to agree that the consideration recited should be payable only conditionally, and as they have entered into such contract and reduced it to writing, the same conclusive presumptions arise as in other cases, that all the terms of their contract are embodied in the writing. If then the estate of Thomas G. Richey is still liable for any portion of the purchase money of said land, such liability must arise from the terms of the agreement of August 5, 1881, and the existence of such liability must be determined solely by the provisions of that instrument.

The contract itself is simple and its terms are free from any material ambiguity. As it appears in the record, it consists of two paragraphs. The first paragraph provides merely for the payment by Thomas G. Richey to Richard W. Richey of an annuity of \$175 during his natural life. The second paragraph provides that, in case the annuity should "prove insufficient for the necessities, wants or comforts" of Richard W. Richey, Thomas G. Richey should pay such additional sums of money as should be required or necessary, from time to time, "to supply all the wants or to in any way minister to the comfort or satisfaction" of Richard W. Richey, with the proviso, however, that the aggregate of the payments to be made under the contract should not exceed the sum of \$2500 and interest thereon at the rate of seven per cent per annum from the date of the contract. This was all Thomas G. Richey agreed to do. It was in substance an agreement to provide for the support and maintenance of Richard W. Richey during his natural life, in such manner that all his necessities, wants and comforts should be supplied, the total expenditure in that behalf

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Opinion of the Court.

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not to exceed the \$2500 and interest. This was a contract which it was perfectly competent for the parties to make. Richard W. Richey had a right to sell his farm to his son for \$2500 cash and a contract by his son to support and maintain him during life, and the rights and obligations of the parties are in no respect affected by the fact that the cash payment and the ultimate amount which his son might become liable to pay under the contract were added together and inserted in the deed as the consideration of the conveyance.

No pretence is made that Thomas G. Richey did not fully perform his contract so long as he lived, or that his legal representatives did not perform it after his death during the residue of the life time of Richard W. Richey. Upon what theory then can it be said that a balance still remains due on said contract from his estate? The contract contains no promise or undertaking, either in terms or by implication, to pay such balance. An attempt is made to obtain an interpretation favorable to the theory of the claimant by transposing the several clauses of the contract, but the transposition insisted upon consists not only in taking the proviso for the principal clause, but in changing that which was manifestly intended merely as a limitation upon the ultimate amount which Thomas G. Richey should be called upon to pay, into an absolute promise to pay that amount in full. We know of no rule which can justify the courts in taking such liberties with contracts under guise of construing them. It would have the effect of importing into them terms to which the parties have never agreed, thus in reality making contracts for the parties instead of giving construction to such as they have made for themselves.

We are of the opinion that the construction of said contract contended for by the defendant is the true one, and that the foregoing propositions submitted by the defendant's counsel to be held as the law in the decision of the case were substantially correct and should have been adopted by the court. It follows that the Circuit Court erred in refusing said propo-

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Syllabus.

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sitions, and that the Appellate Court erred in affirming the judgment. The judgments of the Circuit and Appellate Courts will be reversed, and the cause will be remanded to the latter court for further proceedings not inconsistent with this opinion.

*Judgment reversed.*

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HIRAM GOULD *et al.*

v.

MARY E. STERNBERG.

*Filed at Ottawa May 16, 1889.*

1. REVERSAL—*effect upon a prior sale under the judgment—as to parties and privies—and third persons.* Where property of a defendant has been sold on a judgment, afterward reversed, to a party to such judgment, the defendant can recover it back. If the purchaser be a third party, he can recover from the plaintiff the value thereof; but the title to the property, in that case, will not be affected by the reversal. No one but the defendant or his assignee can take advantage of such reversal; and he may waive that right, or if he has lost nothing by the judgment, he can, of course, gain nothing by its reversal.

2. A sale on execution, based on a judgment afterward reversed, is not absolutely void, but voidable, only, at the election of the owner of the property sold. If the property of a third person is sold in satisfaction of the debt, the defendant in the judgment can take no advantage of the reversal.

3. A creditor under a judgment sued out an execution thereon, under which he became the purchaser of a tract of land which the debtor had fraudulently sold and conveyed to another. The creditor then filed his bill against his debtor and his grantee, to set aside the conveyance of the former to the latter as fraudulent, and a decree was entered therein setting aside the conveyance and vesting the title in the complainant. The judgment under which the sale was made was reversed about the date of the decree, and no steps were taken for a rehearing in the chancery suit, or bill of review filed: *Held*, that the reversal of the judgment did not operate to divest the title of the creditor as vested by the decree, and that such decree could not be attacked collaterally.

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Statement of the case.

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4. **ATTACKING JUDICIAL PROCEEDINGS COLLATERALLY—*effect of mere error.*** A decree, however erroneous it may be, is binding upon the parties until vacated or reversed.

5. **SAME—*determination of a fact—conclusiveness—in a collateral proceeding.*** A judgment or decree which necessarily affirms the existence of any fact, is conclusive upon the parties and their privies whenever the existence of that fact is again in issue between them. So a decree vesting title in the complainant is *res judicata* as to the defendants and their privies, and can not be questioned by them in an action of ejectment, even upon facts not presented in the prior suit.

6. **AFFIRMANCE of decree—*conclusiveness as to error.*** Where a decree is affirmed by the Supreme Court, it must be regarded as free from any error.

7. **CHANCERY—*newly discovered matter—how availed of—after reversal.*** Where, after the cause has been submitted to the court on a bill to set aside a conveyance made in fraud of creditors, and confirm the title to land in the complainant, as purchaser of the same under execution, the decree to be entered of the term the cause is submitted, the judgment under which the sale was made is reversed, the defendant may, on application at the next term, obtain a rehearing if he is entitled to the benefit of the reversal; or he may file a bill in the nature of a bill of review, upon newly discovered matter, and thus obtain relief.

WRIT OF ERROR to the Circuit Court of Will county; the Hon. CHARLES BLANCHARD, Judge, presiding.

This is an action of ejectment, commenced by Mary E. Sternberg, against Hiram Gould, George Gould and Charles Gould, claiming in fee the north half of the south-east quarter of section 9, in township 32, etc. Pending the suit, Charles Gould died, and his administratrix, Clara Gould, was made party defendant. A jury was waived, and upon a trial the court found defendants guilty, and that the right of possession in fee simple was in plaintiff. A new trial under the statute was granted, and upon a second trial before the court a like finding was had, and a motion for a new trial under the statute denied. A motion for a new trial at common law was denied, and judgment entered upon the finding of the court. To this action of the court defendants duly excepted, and all except Clara Gould bring this record here for review, on error.

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Briefs of Counsel.

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Messrs. HALEY & O'DONNELL, for the plaintiffs in error: •

Where a party to a suit becomes the purchaser of land under execution issued upon the judgment therein, a reversal of the judgment will divest him of his title under the purchase. *Fergus v. Woodworth*, 44 Ill. 374; *Guiteau v. Wiseley*, 47 id. 433; *Powell v. Rogers*, 105 id. 318.

Mr. R. E. BARBER, and Mr. B. M. MUNN, for the defendant in error:

The decree of the Du Page circuit court of September, 1873, and affirmed by this court at its September term, 1876, is *res judicata*, and conclusive. *Wadhams v. Gay*, 73 Ill. 423; *Gilpeck v. Dubuque*, 1 Wall. 175; *McCormick v. McClure*, 6 Black. 466; *Steelart v. Lye*, 13 Otto, 66.

A former adjudication respecting the title of the defendant in error has stood unreversed and without modification for nearly nine years, and is conclusive of all questions of right, title and equity involved in that case. *Hawley v. Simons*, 102 Ill. 115; *Fahs v. Darling*, 82 id. 142; *Jenkins v. International Bank*, 111 id. 468; *Attorney General v. Railroad Co.* 112 id. 520; *Dyer v. Hopkins*, id. 168.

In the *Du Page* case, Hiram Gould pleaded title in his father, J. Gould, and attempted to establish it by a forged deed, when instead he might have pleaded title in himself, and that Sternberg was claiming title based upon a void judgment, which had been or would be reversed, and failing to avail himself of this, he stood by his false and fraudulent pleas; wherefore, we insist that this decree upon which we rest, sweeps away every defense which Hiram Gould might have made in that case,—and this, too, of every subsequent suit respecting the title between the same parties. *Kelly v. Donlin*, 70 Ill. 378; *Howell v. Goodrich*, 69 id. 556; *Rogers v. Higgins*, 57 id. 244; *Briscoe v. Lloyd*, 64 id. 33.

The question of judgment reversed, relied upon by the plaintiff in error, presents a collateral issue, which can not be made

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Opinion of the Court.

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available. *Heacock v. Lubukee*, 108 Ill. 644; *Goltra v. Green*, 98 id. 300; *Swiggart v. Harber*, 4 Scam. 364.

By the decree, Hiram Gould, and those holding under him, are estopped from pleading a reversal of, or relying on, the judgment of reversal, because Gould, at the time of the trial in the Du Page circuit court, pleaded title to the land in James Gould, his father, and relied upon a fraudulent and forged deed to defeat Mr. Sternberg's title by sheriff's deed, etc. *Greeley v. Thomas*, 56 Pa. St. 35; *Wells v. Higgins*, 13 Am. Dec. 182; *Franklin v. Palmer*, 50 Ill. 202.

We submit that when a party had ample opportunity, for a period of five years from the date of said decree, for an effort to reverse, set aside or modify it, but has acquiesced therein for nine years, he can not be allowed to attack said decree in a collateral proceeding. *Hay v. Baugh*, 77 Ill. 500; *Dempster v. West*, 69 id. 613; *Hays v. Cassell*, 70 id. 669.

In no case could the defendant Gould avail himself of the benefit, if any, of judgment reversed, until he had offered to pay the plaintiffs the money paid upon the purchase of the property at sheriff's sale.

By reference to the decision affirming this decree, (84 Ill. 170,) there can be no question as to the jurisdiction. That the Du Page circuit court had complete jurisdiction of the parties and the subject matter of the title to said land as acquired under sheriff's deed, see *Gould v. Steinburg*, 84 Ill. 170. See, also, above, 13 Otto, 66, 71.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

To maintain the issue on her part, plaintiff below proved a common source of title in Hiram Gould. She then introduced in evidence, without objection, a sheriff's deed for the premises in question, dated September 23, 1881, reciting, that at the January term, 1868, of the Will circuit court, as administratrix of her deceased husband, Phillip A. Sternburg, she obtained a judgment against said Hiram Gould for \$322.40, upon

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Opinion of the Court.

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which, by execution and sale, said deed was executed and delivered to her; also, a bill in chancery in the same court, by her, as complainant, against Hiram Gould, Elizabeth Gould, Delancy Jackson and James Gould, in which, among other things, it is alleged, that on the 11th day of November, 1856, one Richardson and Hiram Gould made and delivered to Phillip A. Sternburg, since deceased, a promissory note for \$200, due in three years, with interest; that said Phillip, prior to his death, had brought suit upon said note, and that afterward, January, 1868, she, as his administratrix, recovered the judgment and obtained the deed above mentioned; that at the time of making said note said Hiram Gould owned the land described in said sheriff's deed, in fee, unencumbered, and continued to own the same up to and at the time of said sale, but in November, 1859, for the purpose of preventing the collection of said note, and without any consideration, he, with his wife, Elizabeth, conveyed the same to said Jackson, and that afterwards said Jackson and wife, without consideration, reconveyed the same to said Hiram Gould, but that said Hiram secretly held said deed for several years, and on May 1, 1880, placed it on record, with the name "Hiram" erased and the name "James" inserted, thereby making the conveyance to James Gould instead of Hiram Gould, which change is alleged to have been a forgery, made for the purpose of cheating and defrauding creditors of said Hiram. She also introduced in evidence the answer of Hiram Gould, in which he avers that the conveyance made by him to Delancy Jackson was in good faith, for a valuable consideration, and that said Jackson took possession under the same, and afterwards conveyed to James Gould. The answer denies, generally, all the allegations of said bill. The answer of James Gould was also introduced, which is a general denial of the bill. The prayer of the bill was, that said conveyances should be set aside as against the complainant therein, and that she be put in possession of said premises.

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Opinion of the Court.

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The decree, after finding the facts substantially as alleged in the bill, decrees that the deed from said Hiram and wife to Jackson be held void, and a cloud upon complainant's title, and orders that "the title to the premises described in said sheriff's deed be declared vested in her (the complainant) under said sheriff's deed, and she is entitled to the possession of the same against defendants and any person holding under them, and that a writ of possession issue."

This cause was submitted at the September term, 1873, and taken under advisement, with a stipulation that the decree should be rendered as of that term. The case was decided March 4, 1874. On appeal to this court the decree was affirmed, September 19, 1876.

Hiram Gould, on behalf of plaintiffs in error, testified, that Charles Gould, the father of part of plaintiffs in error, and George Gould, had been in possession of said premises since 1877. There was also offered in evidence on their behalf certain deeds from James Gould and wife to said George Gould and Charles Gould, but neither of them described the land in controversy in this suit. They proved, over the objection of defendant in error, that the judgment of January, 1868, in favor of defendant in error, against Hiram Gould, was, by an order of this court, made on the 30th of January, 1874, reversed, (see 69 Ill. 531,) and it is upon this last evidence that the decision must turn, it being insisted by plaintiffs in error that the effect of such reversal was to annul and wipe out the legal effect of all that had been done under and in pursuance of that judgment.

It is well settled in this State, that when property of a defendant has been sold on a judgment, afterward reversed, to a party to such judgment, the defendant can recover it back. If the purchaser be a third party, he can recover from the plaintiff the value thereof, but the title to the property, in that case, is unaffected by the reversal. No one but the defendant or his assignees can take any advantage of such reversal, and

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Opinion of the Court.

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there can be no question but that he may waive that right, or, if he has lost nothing by the judgment, he can, of course, gain nothing by its reversal. A sale on execution, based on a judgment afterward reversed, is not, therefore, we conclude, absolutely void, but voidable only, at the election of the owner of the property sold.

The question at issue in the chancery cause between defendant in error and Hiram Gould and others, was, whether or not she should have the title to this land, and the decree was in her favor. However erroneous that decree might have been, it was binding upon the parties until vacated or reversed; but having been affirmed by this court, it is to be regarded as free from all errors. A judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them. (Freeman on Judgments, sec. 249.) The decree vesting title in defendant in error is *res judicata* as to Hiram Gould and James Gould and their privies, and can not be questioned in this suit.

But it is insisted, on the part of plaintiffs in error, that inasmuch as the judgment upon which that decree was based was not reversed until after the decree was rendered, and the court rendering that decree had no jurisdiction to pass upon the validity of that judgment, therefore said decree may be thus collaterally attacked,—in other words, while that decree would be binding upon the parties as the facts existed when it was rendered, yet subsequent events have so changed those facts as to destroy the binding effect thereof. If it be conceded, in the broadest terms, that Hiram Gould could not avail himself of the reversal in the chancery proceeding, it does not follow that he may do so now. Many, perhaps a majority of cases, in which the doctrine of *res judicata* is enforced, are cases in which facts have arisen or been discovered after the adjudication, which, if they had existed or been known at the former trial, might have changed the result. It is not true,

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Opinion of the Court.

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however, in this case, that the reversal might not have been set up in the chancery proceeding. Although the cause was submitted before the order of reversal by this court was made, it had not yet been decided, and there can be no question that if proper notice had been given and an application made to the chancellor for a rehearing at the next term of court, it would have been granted, if made by a party entitled to the benefit of the reversal. He might also have filed his bill, in the nature of a bill of review, upon newly discovered matter, and thus obtained relief. (*Story's Eq. Pl.* sec. 413; *Boyden et al. v. Reed*, 55 Ill. 458.) We think it is clear that he could not lie by, after obtaining his reversal, and permit the decree to become final in the circuit court and affirmed in this court, making no effort in that proceeding to reap its benefits, and now, for the first time, set it up to defeat the title therein decreed.

It is equally clear, that under the proof here made neither of plaintiffs in error is in a position to take any advantage of the reversal of that judgment. Hiram Gould, the defendant, might recover from defendant in error whatever property he lost by reason of the erroneous judgment. What has he lost? By his answer in the chancery proceeding, and by all the evidence in that case, as between himself and James Gould, the property of the latter was sold in satisfaction of that judgment. It is true the court held, that as between defendant in error and James Gould it should be treated as the property of Hiram; but it is too well understood to require the citation of authorities, that in all such cases the conveyance, though void as to creditors, is valid and binding between the parties. Whether or not James Gould could set up the reversal of said judgment as against defendant in error, is not material. Neither he nor those shown to be in privity with him are seeking to do so.

The judgment of the circuit court will be affirmed.

*Judgment affirmed.*

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Syllabus.

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OWEN T. JONES

*v.*JOHN FORTUNE *et al.**Filed at Ottawa May 16, 1889.*

128	518
138	40
128	518
140	508
149	480
143	539
128	518
147	232
128	518
152	589
128	518
162	354
162	438
128	518
168	562
128	518
178	570
128	518
184	344
128	518
200	*581
128	518
209	*487

1. **APPEALS—reversal and remandment—by Appellate Court—power and duty of that court—the trial court directing what the verdict shall be.** It is competent for the trial court to exclude the plaintiff's evidence from the jury, where it has no legitimate tendency to establish the cause of action alleged; and the Appellate Court is authorized, on appeal, to do what it shall hold the trial court should have done in this respect upon the trial.

2. If the Appellate Court reverses the judgment of the trial court for error in its rulings of law, it must remand the cause for a new trial, unless it shall find that the evidence does not tend to prove the cause of action alleged, for otherwise it will deprive the plaintiff of the right to a trial by jury.

3. **SAME—finding of facts—by Appellate Court—and recital thereof in final judgment—how far conclusive.** If the Appellate Court refuses to remand the cause for the reason that the evidence does not tend to prove the cause of action alleged, it must "either wholly or in part find the facts concerning the matter in controversy different from the finding of the trial court;" and in that event it is required to recite in its final order, judgment or decree, the facts as found.

4. The facts found by the Appellate Court, when recited in its final judgment, are not subject to controversy in this court; but this court may inquire whether the law has been correctly applied to them, and thus determine whether the refusal to remand was proper.

5. **SAME—final judgment—in Appellate Court.** A judgment of the Appellate Court reversing and remanding a cause is not a final judgment, and no appeal lies from such judgment to this court.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. A. N. WATERMAN, Judge, presiding.

Messrs. H. T. & L. HELM, for the appellant.

Messrs. HYNES & DUNNE, for the appellees.

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Opinion of the Court.

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Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was trespass, by Owen T. Jones, against John Fortune and Patrick O'Grady, for a personal assault. The defendants pleaded the general issue, and several special pleas admitting but justifying the trespass, on different grounds. Issues were joined on all of the pleas. The jury returned a verdict finding the defendants guilty, and assessing the plaintiff's damages at \$6000. The court overruled a motion for a new trial, and entered judgment upon that verdict. The defendants appealed to the Appellate Court for the First District, and that court reversed the judgment for error in giving a certain instruction and in admitting certain testimony, and refused to remand the cause, and gave final judgment, there, for the defendants. There is no arrest of the judgment. It is simply reversed, and a new trial is denied.

Article 2, section 5, of the present constitution, provides that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate." This case belongs to the class of cases in which the right of trial by jury was enjoyed before the adoption of the present constitution, and it is therefore within this guarantee.

Under our decisions, it is competent for the trial court to exclude the evidence from the jury where it has no legitimate tendency to establish the cause of action alleged, and the Appellate Court is authorized, on appeal, to do what it shall hold the trial court should have done, in this respect, upon the trial. (*Commercial Ins. Co. v. Scammon*, 123 Ill. 601.) But it is manifest that if the Appellate Court shall reverse the trial court for error in its rulings of law, it must remand the cause for a new trial, unless it shall find that the evidence does not tend to prove the cause of action alleged, for otherwise it will deprive the plaintiff of the guaranteed right of trial by jury. If the Appellate Court shall refuse to remand the cause, for the reason that the evidence does not tend to prove the cause of action alleged, it must, "either wholly or in

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Opinion of the Court.

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part, find the facts concerning the matter in controversy different from the finding of the trial court," and in that event it is required to recite, in its final order, judgment or decree, the facts as found. (Practice act, sec. 88, 2 Starr & Curtis' Stat. p. 1842.) The facts, when thus recited, are not the subject of controversy in this court, but we may inquire whether the law has been correctly applied to them, and therefore determine whether the refusal to remand was proper.

A judgment reversing and remanding a cause is not a final judgment, and no appeal lies from such a judgment of the Appellate Court to this court. *Anderson v. Fruitt*, 108 Ill. 378; *Harzfeld et al. v. Converse*, 105 id. 534.

Appellant is entitled to a new trial, unless the evidence does not tend to prove the cause of action alleged; and he is entitled to have this court review the law as applied to the findings of the Appellate Court in this respect. Were we to act upon the present judgment as a final judgment, we would be compelled to affirm the judgment of the Appellate Court, unless we found that it erred in its rulings of law in respect of instructions and the admission of evidence, and thus cut off all opportunity of another trial, notwithstanding it might be manifest that there are grounds of recovery unaffected by those rulings.

The judgment is reversed, and the cause is remanded to the Appellate Court, with directions to that court either to recite in its final order, judgment or decree, its finding of facts whereon it bases its final judgment of reversal and refusal to remand the cause, or that it enter an order remanding the cause to the trial court for further proceedings in conformity with its opinion as filed in the case.

*Judgment reversed.*

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Syllabus. Opinion of the Court.

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MICHAEL C. McDONALD

v.

MARSHALL J. ALLEN *et al.*

*Filed at Ottawa May 16, 1889.*

128	521
133	536
128	551
142	549
128	521
150	561
128	551
163	529

**APPEALS—what questions to be considered—conclusiveness of affirmance by Appellate Court.** Where an action is tried by the court below without a jury, and no exceptions are taken as to the admissibility of evidence, and no written propositions of law are submitted to the court, and the Appellate Court affirms the judgment, that judgment will be conclusive, and on an appeal to this court there will be nothing for it to consider.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

Messrs. MEECH & ASAY, for the appellant.

Mr. L. S. HODGES, for the appellees.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was an action of debt, brought by Marshall J. Allen, George H. Allen, Augustus S. Pyatt and Edson Bradley Jr., upon an appeal bond, executed to the plaintiffs, by Michael C. McDonald, the defendant, as surety for Edward G. Asay on an appeal from the Circuit Court of Cook county to the Appellate Court of the First District. Said bond, after reciting the recovery by the plaintiffs, in the Circuit Court, of a decree against Asay for \$2850 and costs, and that Asay had prayed for and obtained an appeal therefrom to the Appellate Court, was conditioned that Asay should prosecute his appeal with effect, and pay the amount of the decree, interest, damages and costs rendered and to be rendered against him, in case said decree should be affirmed. The declaration averred

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Opinion of the Court.

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the affirmance of said decree by the Appellate Court and the recovery by the plaintiffs of their costs in that court, and alleged as a breach the non-payment of the decree, interest and costs. The defendant filed a plea denying the affirmance of the decree by the Appellate Court, and upon the issue joined upon that plea, the cause was tried by the court without a jury. Upon such trial said issue was found for the plaintiffs and their damages assessed at the amount of the decree, interest and costs, and judgment was rendered accordingly.

No complaint is made of any rulings of the court during the progress of the trial, and no propositions were submitted to be held as the law in the decision of the case, the only contention being that the finding of the court was contrary to the evidence. The plaintiffs read in evidence the bond sued on, and a certified copy of an order of the Appellate Court affirming a decree of the Circuit Court in favor of the plaintiffs and against said Asay, and rendering judgment in favor of the plaintiffs for their costs in that court. The defendant thereupon introduced evidence tending to show that the decree actually taken to the Appellate Court by appeal was one rendered in a suit in which Asay was defendant and the plaintiffs and one Stevens were complainants. He thus attempted to raise a question as to the identity of the decree affirmed. The order of affirmance was at least *prima facie* evidence that the decree affirmed was the one appealed from, and such identity was found by the trial court, and that finding has been affirmed on appeal by the Appellate Court. The question thus raised—and it is the only one presented by the present record—is a mere question of fact upon which the judgment of the Appellate Court is conclusive, and there is therefore nothing left for us to do but to affirm the judgment.

*Judgment affirmed.*

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Syllabus. Brief for the Plaintiffs in Error.

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## S. C. AMES et al.

v.

## JACOB SANKEY et al.

*Filed at Ottawa May 16, 1889.*

**1. SALE OF LAND FOR TAXES**—*of the process, and the form thereof.* Section 194 of the Revenue law provides, that on the day advertised for sale, the county clerk, assisted by the collector, shall carefully examine the list upon which judgment has been rendered, etc., and shall make a certificate, to be entered on said record, following the order of court, that such record is correct, and that the judgment was rendered upon the property therein mentioned, for the taxes, interest and costs due thereon. This certificate is to be attested by the clerk, under the seal of the court, and is made the process under which all sales are made. Without such attested certificate a sale of land, or any interest therein, is void, and no title can be derived from any such sale.

**2.** Where the law expressly directs that process shall be issued in a specified form, such a provision is mandatory. This rule applies to that which stands in the place of process, and performs its office.

**3. CLOUD UPON TITLE**—*void tax certificates.* Where tax certificates are issued upon a void sale for taxes, a court of equity will set them aside as clouds on the title, at the suit of the owner, although the time of redemption from the sale has not expired, the owner being in possession or the land being vacant and unoccupied.

**4. SAME**—*setting aside void tax certificates—upon terms.* On bill to set aside tax certificates when the sale is void, as being a cloud on title, the amount the complainant should be required to pay to entitle himself to the relief sought, is the amount paid at the tax sale, together with the subsequent taxes paid, and interest at the rate of six per cent per annum from the dates of the respective judgments.

**WRIT OF ERROR** to the Appellate Court for the First District; —heard in that court on writ of error to the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. H. S. McCARTNEY, for the plaintiffs in error:

Can a party who suffers his land to be sold for taxes, come into a court of equity before the time of redemption expires, and by some technical error not affecting the justice of the tax,

128	523
137	666
138	270
138	523
64a	83
128	523
135	58
128	523
187	1164
128	523
190	4447
128	523
194	435
128	523
198	1589
128	523
214	874
118a	4355

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Brief for the Defendants in Error.

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have the sale cancelled without paying the statutory rates? *Gage v. Rohrbach*, 56 Ill. 262; *Gage v. Chapman*, id. 311; *Phelps v. Harding*, 87 id. 442; *Gage v. Nichols*, 112 id. 269.

Mr. F. W. S. BRAWLEY, for the defendants in error:

All the facts stated in the bill are admitted by the demurrer. *Gage v. Bailey*, 115 Ill. 646; *Cobb v. Railroad Co.* 68 id. 233.

The clerk's certificate was required by section 194, chapter 120, of the Revised Statutes. *Eagan v. Connelly*, 107 Ill. 466.

The certificate of the clerk was indispensable as his attestation to an execution. There was no precept, and no authority to make the sale in this case. *Sidwell v. Schumacher*, 99 Ill. 426; *Eagan v. Connelly*, 107 id. 466; *Bell v. Johnson*, 111 id. 381.

The pretended sales were clouds upon complainants' title, and he was entitled to the relief sought, in equity. *Phelps v. Harding*, 87 Ill. 442; *Farwell v. Harding*, 96 id. 32; *Bell v. Johnson*, 111 id. 374; *Gage v. Rohrbach*, 56 id. 262; *Barnett v. Cline*, 60 id. 205; *Gage v. Chapman*, 56 id. 311; *Gage v. Billings*, id. 268; *Gage v. Abbott*, 99 id. 366; *Gage v. Nichols*, 112 id. 269; *Wing v. Sherrer*, 77 id. 200; *Reed v. Tyler*, 56 id. 288; *Hodgen v. Guttery*, 58 id. 431; *Brooks v. Kearns*, 86 id. 547; *Cooley on Taxation*, 542, 543.

It was error to sustain the demurrer to the bill for want of equity, there being equity in the bill, and the demurrer going to the whole bill. *Westcott v. Wicks*, 72 Ill. 524; *Crane v. Hutchinson*, 3 Bradw. 31.

For want of the proper legal process of sale, the tax certificates were void, but they operated as a cloud on complainants' title, and it is well settled that equity will remove clouds from the title to real estate. *Wing v. Sherrer*, 77 Ill. 200; *Whitney v. Stevens*, 97 id. 482; *Campbell v. McCahan*, 41 id. 45; *Hodgen v. Guttery*, 58 id. 431.

The case made by the bill seems to fall directly within the principle of the cases in *Phelps v. Harding*, 87 Ill. 472, *Far-*

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Opinion of the Court.

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*well v. Harding*, 96 id. 32, *Durfee v. Murray*, 7 Bradw. 213, *Peacock v. Carnes*, 110 Ill. 99, and *Gage v. Rohrbach*, 56 id. 262.

In this case, the court say a worthless certificate in a tax sale is a cloud on the title. *Gage v. Chapman*, 56 Ill. 311; *Bell v. Johnson*, 111 id. 374; *Eagan v. Connelly*, 107 id. 458.

The sales having been made without the certificates of the clerk, as required by the statute, were therefore illegal, and the Supreme Court of Illinois has decided "that in the case of a tax certificate issued upon an illegal sale of land for taxes, a court of equity will take jurisdiction to annul the sale and cancel the tax certificate, and thus remove a cloud upon the title of the land." *Gage v. Chapman*, 56 Ill. 314.

While Sankey might have had a defense at law, it can not be said he had a remedy at law. (*Gage v. Billings*, 56 Ill. 268.) Sankey did not ask to recover anything,—only that the cloud on his title should be removed. He made the proper offer to do equity, and it would seem that he was entitled to this relief, in equity, beyond question, on payment of the taxes paid by the holder of the certificates, with six per cent interest thereon. *Barnett v. Cline*, 60 Ill. 207; *Phelps v. Harding*, 87 id. 442; *Farwell v. Harding*, 96 id. 32; *Moore v. Wayman*, 107 id. 192; *Smith v. Hutchinson*, 108 id. 662; *Peacock v. Carnes*, 110 id. 99; *Bell v. Johnson*, 111 id. 374; *Carnes v. Peacock*, 114 id. 347; *Gage v. Pirtle*, 124 id. 502.

**Mr. JUSTICE MAGRUDER** delivered the opinion of the Court:

This is a bill to remove certain tax certificates as clouds upon the title to certain lots in Chicago. The tax sales were made in October, 1884. The bill was filed in July, 1886, several months before the expiration of the period of redemption. The only question in the case is, whether the bill will lie, and we think that this question must be answered in the affirmative. *First*, the tax certificates of purchase issued by the County Clerk were void, because the clerk did not make and

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Opinion of the Court.

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enter upon the record the certificate required by section 194 of the Revenue Act. (Starr & Cur. Stat. vol. 2, page 2093). That section provides, that, on the day advertised for sale, the county clerk, assisted by the collector, shall carefully examine the list, upon which judgment has been rendered, etc., and shall make a certificate to be entered on said record following the order of court, that such record is correct, and that judgment was rendered upon the property therein mentioned for the taxes, interest and costs due thereon. The section also provides, that the certificate, so to be made and entered by the clerk, shall be attested by him under seal of the court, and shall be the process on which all real property or any interest therein shall be sold for taxes, special assessments, interest and costs due thereon. Such certificate is required to be substantially in the form set out in the section.

Where the law expressly directs that process shall be in a specified form, and issued in a particular manner, such a provision is mandatory. (*Sidwell v. Schumacher*, 99 Ill. 426). This rule applies to that which stands in the place of process and performs its office. (*Eagan v. Connelly*, 107 Ill. 458). In this case, there was no attested certificate, and, therefore, no process, under which the officer making the sale was authorized to act. Hence the sale, and the certificates issued to the purchaser, were void. (*Bell v. Johnson*, 111 Ill. 374; *Neff v. Smyth*, 111 id. 100).

*Second*, the tax certificates, having been issued upon a void sale for taxes, will be removed by a court of equity as clouds upon the title. It is alleged in the bill and admitted by the demurrer, that all the lots in controversy are vacant and unoccupied except two, and that complainants are in the possession of these two. The certificates, though worthless, tend to cloud the title, as they are calculated to depreciate the value of the lots by giving rise to the fear of litigation and annoyance. (*Gage v. Rohrbach*, 56 Ill. 262; *Gage v. Chapman*, 56 id. 311; *Phelps v. Harding*, 87 id. 442).

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Syllabus.

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*Third*, the bill offers to "pay whatever moneys, taxes and interest equity and the court may require." The amount, which the complainants should be required to pay, in order to entitle themselves to a decree removing the certificates as clouds, is the amount paid at the tax sale, together with the subsequent taxes paid, and interest at the rate of six per cent per annum from the dates of the respective judgments. This is the uniform rule, laid down by this court in a long line of decisions. (*Gage v. Pirtle*, 124 Ill. 502.)

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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WILLIAM T. IRWIN, Admr.

v.

MARY WOLLPERT *et al.*

*Filed at Ottawa May 16, 1889.*

1. *DEVISE—of an annuity charged upon rents and profits—whether chargeable upon the corpus of the estate.* A direction in a will to pay an annuity out of the rents and profits of lands devised, charges only the rents and profits, and not the *corpus* of the estate, unless a contrary intention appears, and can be enforced only against the devisees personally, so far as they have received the rents; and the fee or other estate in the realty can not be sold to provide the annuity.

2. *SAME—the annuitant incumbering part of the estate yielding the rents and profits—liability of the residue.* A testator devised lot 1 to A, his son, and lot 2 to B, C and D, his grandchildren, and gave his widow a yearly annuity of \$300, "to be issuing and payable out of" said lots; and the will provided, that if any part of such annuity should remain unpaid after the expiration of thirty days from the time the same should be due and payable, the widow might enter into the premises so charged and receive the rents and profits thereof until the annuity was thereby paid, or paid by the devisees. The widow and the son, A, gave a deed of trust, for a loan to the latter, on lot 1, under which a sale was had, in default of payment, and the title was thereby lost. Lot 1 was the most valuable of the two lots. It appeared that the widow received all the rents and profits of both lots until the sale under the trust deed, and of

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Opinion of the Court.

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lot 2 to her death, through her agents, and that B, C and D were never in possession of lot 2, and never received any rents of the same: *Held*, in a suit by the administrator of the widow, to collect the annuity, that the devisees of lot 2 were not liable for any part of the annuity, and that if they were liable they could only be chargeable with a ratable part thereof.

3. In such case, the widow, by joining in the trust deed, whereby the title to one lot became lost, relinquished all claim to a ratable part of her annuity, which should have been paid out of lot 1; consequently, neither she nor her administrator could charge the whole of the annuity against the grandchildren's lot, even if they were liable beyond the rents and profits thereof.

4. *SAME—allowing the annuity to accumulate.* If the annuity should not be paid, the will provided a remedy by taking possession of the lots; and the widow could not lie by and neglect her remedy, and permit the annuity, without the fault of the devisees, to accrue from year to year, until it was sufficient in amount to swallow up the fee of the lots, and then ask a court of equity to have them sold to satisfy her claim.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. S. S. PAGE, Judge, presiding.

Mr. JAMES A. CAMERON, and Mr. WILLIAM S. KELLOGG, for the appellant.

Mr. DAN F. RAUM, and Mr. N. ULRICH, for the appellees.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

George M. Young died in April, 1873, seized in fee of lots 1 and 2, block 66, in Monson & Sanford's addition to Peoria, Illinois. By his last will he devised lot one (1) to his son, Gottlieb M., and lot two (2) to appellees, children of his deceased daughter. He gave his wife, Christiana G. Young, an annuity of \$300, to be paid out of said lots, that part of the will being in the following language:

"I give, devise and bequeath to my wife, Christiana Gottlieben Young, and her assigns, for and during the term of her natural life, one annuity or clear yearly rent or sum of \$300,

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Opinion of the Court.

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free of all taxes or other deductions, to be issuing and payable out of the real estate above devised to my son, Gottlieb M. Young, and to the children of my daughter, Juliana Catherine Wollpert, in equal quarterly payments, at Peoria, on the first day of January, April, July and October, in each and every year, as aforesaid. And I do hereby charge and subject the said real estate with and to the payment of the said annuity or yearly rent or sum of \$300, at the times and in the manner aforesaid, fully empowering and authorizing my said wife and her assigns,—provided said annuity, or any part thereof, shall remain unpaid after the expiration of thirty (30) days from the time the same shall be due and payable, as aforesaid,—to enter into all and singular the premises charged with the annuity, as aforesaid, and the rents, issues and profits thereof, to receive and take until she and they be therewith and thereby, or by the person or persons then entitled to the immediate possession of the premises, paid and satisfied the same, and every part thereof, and all the arrears then due and payable, together with her and their costs, damages and expenses paid out and sustained by reason of the non-payment thereof."

The son, Gottlieb M., and the wife, Christiana G., were appointed, by his will, executors.

On the 23d of November, 1875, the said Gottlieb M., with Susannah, his wife, and the said Christiana G., executed and delivered a trust deed on said lot one (1), to secure a loan of \$2000 to said Gottlieb M., under which the lot was afterwards sold, and the title thereto vested in one Archibald McMasters, February 1, 1879. He then took possession, and from that date he and his grantee, Sarah McMasters, continued to occupy the premises and enjoy all the rents and profits of the same to the filing of the bill herein. Gottlieb M. died October 10, 1881, leaving Susannah, his widow, and several children. Christiana G., appellant's intestate, died in 1885, and he was duly appointed her administrator. The said Susannah Young filed her claim against the estate for board-

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Opinion of the Court.

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ing, nursing and washing for deceased, which was allowed February 8, 1887, for \$1935.10. Pending this claim in the county court, appellant filed this bill, seeking to recover an unpaid balance of said annuity.

By the original bill, he sets up the said will of George M. Young, and avers that at the time of the death of the intestate there was due her on said annuity, and that the same was and is a charge and incumbrance upon both of said lots one (1) and two (2), and a valid lien thereon, superior to all other liens or claims thereto. The prayer of the bill is, "that the amount of the said annuity due and unpaid to said Christiana G. Young at the time of her death, be ascertained, and by this court declared a valid and subsisting lien on both of said lots, and that said defendants, or some of them, may be decreed to pay said amount of due and unpaid annuity to complainant, as administrator to the estate of said Christiana G. Young, by a short day to be fixed by the court, and that in default of such payment said lots may be decreed to be sold by the master in chancery, as in case of foreclosure of mortgages under decree in chancery, to satisfy said lien for said annuity. To this bill, appellees, the said Susannah Young, who is averred to be in possession of said lot two (2), claiming some interest therein, Sarah McMasters, John D. Hall and C. W. Edwards, who are in possession of said lot 1, claiming some interest therein, and the children and heirs of Gottlieb M. Young, deceased, were made parties defendant. The bill was afterward dismissed, by complainant, as to Sarah McMasters, John D. Hall, C. W. Edwards and Susannah Young. A part of the children of Gottlieb M. Young, being minors, answered by their guardians *ad litem*, the adults not answering.

Appellees answered, admitting the facts set up in the bill as to title in George M. Young, devise to Gottlieb M. Young and themselves, and the annuity to Christiana G.; but they deny that any part of said annuity remains due and unpaid to her or her administrator, averring that the same has been

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Opinion of the Court.

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fully paid; that from the death of said George M. Young to her death, she was in possession of lot 2, and received all the rents and profits thereof, which much more than paid and satisfied that part of said annuity chargeable against said lot; that she also took possession of and had all the rents and profits of lot one (1), until the sale thereof under said trust deed, which is set up in their answer.

The cause being referred to the master in chancery to take and report the proofs, together with his conclusions, he reported, that from the evidence he found, that from the death of the said George M. Young to April 10, 1881, the said Gottlieb M., for his mother, Christiana G., collected and used the whole of the rents and profits of said lots, except that on lot one (1) none accrued after February 1, 1879; that after his death, the said Christiana G. continued to reside with his widow, the said Susannah, until she died, during all of which time the said Susannah continued to collect, use and appropriate, as the agent of Christiana G., all the rents and profits of said lot two (2); that said Christiana G. died on said lot two (2), being in possession thereof, residing thereon with said Susannah. Exceptions to this report being overruled, appellant obtained leave of court to amend his bill, and did so by setting up title to lot one (1) in said Susannah, under an alleged parol agreement between her and George M. Young, by which he agreed to convey her said lot 1, provided she would cause to be built thereon a dwelling house. When this contract was made, when the house was to be built, what it should cost, and when the deed was to be made, does not appear; but it is averred, generally, that she performed the contract on her part, taking possession of said lot, but that he failed and neglected to make the deed to her. The object of this amendment seems to be to charge the whole of said annuity on lot two (2), notwithstanding, by the terms of the will, it was payable out of both lots. The cause being finally submitted on the pleadings and the master's report, the bill was dismissed for want of equity,

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Opinion of the Court.

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at complainant's costs. That decree was affirmed by the Appellate Court.

There is no equity in the original bill, on its face, and certainly, as amended, it can not be said to appeal to the conscience of a court for the relief prayed. It is not pretended by the bill, that appellees ever had possession of lot two (2), even to the date of filing the bill, or that they ever received any of the rents thereof. There is nothing in the bill to show that Christiana G. did not exercise, or could not have exercised, her right, under the will, to take possession of and receive the rents and profits of said lots, thus fully satisfying her annuity, as provided by the terms of the will. She could not, therefore, permit her annuity, without the fault of appellees, to accrue from year to year, until sufficient in amount to swallow up the fee of these lots, and then ask a court of equity to have them sold to satisfy such claim. Besides, we think it is clear, from the provisions of the will giving her the annuity, that it was not a charge upon the lots themselves, but only upon the rents and profits of the same, which being true, her rights were only enforceable against such rents and profits, and not against the *corpus* of the estate. "A direction to pay an annuity out of the rents and profits, charges only the rents and profits, and not the *corpus* of the estate, unless a contrary intention appears, and can be enforced only against the devisees personally, so far as they have received the rents, and the fee and life estate in the realty could not be sold to provide the annuity." *Delaney v. Van Aulen*, 84 N. Y. 16.

Again, the theory of the bill is, that the annuity was made a charge upon both lots, each to pay a ratable part thereof; but the administrator, of his own motion, seeks to have the more valuable of the two entirely discharged, and the whole charged against appellees. To permit that to be done, would be to violate the expressed provisions of the will, and that, too, without the slightest equitable ground therefor. What right has the administrator to set up adverse claims in third parties to

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Syllabus.

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defeat the will of George M. Young, if the construction he places upon it is correct? It also appears that his intestate voluntarily joined in the trust deed, by which the title to lot 1 became vested in McMasters, and she certainly thereby relinquished all claim to a ratable part of her annuity, which should have been paid out of said lot 1. She could not, therefore, nor can her administrator, charge the whole of said annuity against appellees, even if they were liable beyond the rents and profits of said lot 2.

On the theory of the case as tried in the court below, the conclusion reached by the Appellate Court is clearly right, and we are satisfied with the views expressed by that court in the opinion rendered by SMITH, J. There is no merit in the cause made by appellant, either in law or in fact.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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THE NATIONAL BANK OF ILLINOIS

v.

MARY S. BAKER.

*Filed at Ottawa May 16, 1889.*

1. **PLEDGE—*sale of the pledge—before and after maturity—demand of payment—notice to redeem.*** Ordinarily, when a pledge of property is made to secure the payment of indebtedness, the pledge can not be sold until after the debt is due and demand is made to redeem, and notice is given of the intention to sell.

2. Parties may, however, by contract, agree that in certain contingencies the pledge may be sold before the debt is due, or that it may be sold without previous notice, etc. But in such case, what is the contract must be determined from the language used, and not from a consideration of what would best subserve the interests of the creditor, for the law has no greater regard for his interest than it has for that of the debtor.

3. The rule at common law was, that the pledgee must give notice to the pledgor to redeem, before he could sell. The purpose of this notice

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Brief for the Appellant.

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was to terminate the indulgence and require the pledgor to protect his property, while notice of the sale is to invite competition and secure the best price attainable by a sale.

4. Where the sale is only to be made in the event of failure to make payment at the maturity of the debt, it may be that the pledgor is not entitled to a demand of payment. But when the pledgee elects to sell the pledge before the debt is due, because of the happening of a contingency provided for by agreement, the pledgor is entitled to notice to redeem, and that the pledgee will not wait till the maturity of the debt. A sale without notice, in such case, will not pass the pledgor's right of redemption.

5. *SAME—sale before maturity—in case of depreciation of pledge "in market value"—worthless stocks.* The makers of a promissory note deposited in pledge with the payee certain certificates of shares in a corporation, and also a life policy of insurance of one of the makers of the note, calling for \$5000. The certificates of stock proved to be counterfeits, and worthless. The contract of the parties provided, that on default of payment of the note at maturity the pledgee might sell the pledge, and also, "in the event of said security, or any part thereof, depreciating in market value," that the pledgee might, either before or after maturity of the note, sell the pledge, either at public or private sale, and waive any and all notice of the sale to the pledgors: *Held*, that the words "depreciating in market value," had no reference to the security of the certificates of stock, for, being worthless, their value could not depreciate; and that a sale by the pledgee before the maturity of his debt did not pass the absolute title, but that the pledgors might redeem the same by payment of the note when due.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GWYNN GARNETT, Judge, presiding.

Mr. MATTHEW P. BRADY, for the appellant:

A power to sell collaterals may be given by the contract of pledge. Such a power is not contrary to public policy. The terms of the contract of pledge govern the rights of the parties as to the time, place and notice of sale. Colebrook on Collateral Securities, p. 162, sec. 118; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Loomis v. Stave*, 72 id. 623; *Zimpleman v. Veeder*, 98 id. 614; *Milliken v. Dehon*, 27 N. Y. 364; *Choteau v. Allen*, 70 Mo. 290.

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Brief for the Appellee.

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Under a special authority to sell collaterals upon default, without notice, all notice of the time and place of sale, such as the law requires in the absence of a special agreement, is waived. *Insurance Co. v. Dalrymple*, 25 Md. 242; 25 id. 269; *Bryson v. Rayner*, id. 424; 29 id. 473.

If the pledgee, under a power of sale conferred on him, makes a *bona fide* sale of the collateral to one capable of buying, the sale will pass the title to the collateral beyond the pledgor's reach. *Zimpleman v. Veeder*, 98 Ill. 614; *Lewis v. Mott*, 36 N. Y. 395; *Duncomb v. Railroad Co.* 84 id. 190; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Jerome v. McCarter*, 94 U. S. 734; *Bridge Co. v. Douglas*, 12 Bush, 673; *Railroad Co. v. Iron Co.* 50 N. H. 57.

A *bona fide* sale of collaterals, made after default, under a power of sale, vesting the title in a purchaser for value in good faith, is not affected by a tender of the debt and charges made subsequently thereto. *Loomis v. Stare*, 72 Ill. 623; *Choteau v. Allen*, 70 Mo. 290; Colebrook on Collaterals, sec. 122.

Messrs. ABBOTT & BAKER, for the appellee:

Under the power executed, a valid sale could not be made without making a demand to redeem. *Wilson v. Little*, 2 N. Y. 443; *Stearn v. Marsh*, 4 Denio, 227; *Mory v. Wood*, 12 Wis. 419; *Strong v. National Bank*, 45 N. Y. 718; *Bryan v. Baldwin*, 32 id. 233.

The attempted sale by Kretsinger to Freeman was not made in good faith, of which fact Freeman had notice, and therefore the sale was void.

The pledgee of personal property is the trustee for the pledgor. *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Iron Co. v. Brick Co.* 82 id. 548; *Zimpleman v. Veeder*, 98 id. 614.

A transferee taking with notice of the violation of the trust, takes it subject to the trust. *Fawsett v. Insurance Co.* 5 Bradw. 274.

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Opinion of the Court.

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While a power may authorize a sale either at public or private sale, the pledgee, nevertheless, is bound to use reasonable care and diligence to obtain the best price for the pledge. Like all trustees, he must act in good faith.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

On the 14th of December, 1885, William Baker, and Mary S. Baker, his wife, made and delivered their promissory note to W. H. Kretsinger, and thereby promised to pay him, ninety days after date, \$600, with interest thereon at the rate of eight per cent per annum. Annexed to the note was a power reciting that there was deposited with Kretsinger, as security for the payment of the note, a certificate of stock of the "Journal of Commerce Company," calling for one hundred shares, of \$100 each; also, policy 63,990, for \$5000, in the New England Mutual Life Insurance Company, on the life of William Baker, payable to his wife, Mary S. Baker, and concluding as follows:

"And in default of payment of said note, or any part thereof, at maturity, I do hereby authorize said Kretsinger, or his assigns, to sell and dispose of said security, or any part thereof, at public or private sale, in his or their discretion; and in the event of said security, or any part thereof, depreciating in market value, I do hereby authorize said Kretsinger, or his assigns, at his or their option, to sell and dispose of said security, or any part thereof, at any time before or after the maturity of said note, at either public or private sale; and in the event of sale before or after the maturity of said note, as aforesaid, no notice of such sale shall be required to be given to the undersigned, or to any other person or persons whomsoever, either by advertisement or otherwise; and the proceeds of such sale or sales, so made as aforesaid, shall, after the payment of all expenses and commissions attending said sale or sales, be applied on said note, and the balance, if any, after payment of said note, with interest, shall be returned to the

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Opinion of the Court.

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undersigned, his heirs, executors, administrators or assigns; and at any sale of said collaterals, or any part thereof, made by virtue hereof, it shall be optional with the legal owner or holder of said promissory note to bid for and purchase said collaterals, or any part thereof.

"Witness my hand and seal, at Chicago, in the State of Illinois, this 14th day of December, A. D. 1885.

(Signed)

WILLIAM BAKER, (seal)

(Signed)

MARY S. BAKER. (seal)"

Before the maturity of the note, and on the 23d of January, 1886, Kretsinger received the amount due upon his note from an agent of the Bank of Illinois, to whom William Baker was largely indebted, and, in consideration thereof, indorsed and transferred the note and the power and securities to him, and he subsequently formally transferred them to the bank. There was no demand upon the Bakers to redeem the pledge before these transfers. William Baker was dangerously sick at the time of this transfer, and he died of that sickness on the 15th of February, 1886. Tender was made to the bank of the amount due upon the note, for the payment of which the pledge was made, in due time, but the bank refused to accept it.

The question here is, whether the transfer by Kretsinger to the agent of the bank passed the legal title to the entire amount of the policy, or did it only transfer the policy as a security for the payment of the \$600 note and accruing interest.

There was proof that the signature of the secretary of the company, to the stock of the "Journal of Commerce Company," was not genuine. There is no evidence to prove the value of that stock, if genuine, and there is no evidence tending to prove that Mary S. Baker had any knowledge, at or before the transfer by Kretsinger, that it was not genuine. Appellant contends that the stock not being genuine, there was a "depreciating in market value" of the security pledged, within the meaning of those words as used in the power. The

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Opinion of the Court.

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courts below held otherwise, and, consequently, that Kretzinger transferred the policy of insurance only so far as it was a security for the payment of his note transferred at the same time to the same party, and that after payment of the amount due upon that note, Mary S. Baker is entitled to the balance of the amount due upon the policy. We entirely concur in this ruling. Whether parties shall take any, and, if any, what kind of, security for the payment of a debt, is purely a matter to be determined by their contract. Ordinarily, when a pledge of property is made to secure the payment of indebtedness, the pledge can not be sold until after the debt is due and demand is made to redeem, and notice is given of the intention to sell. Story on Bailments, (5th ed.) sec. 310. But parties may, by contract, agree that in certain contingencies the pledge shall be sold before the debt is due, or that it shall be sold without previous notice, etc.; but in such case, what is the contract must be determined from the language employed, and not from a consideration of what would best subserve the interests of the creditor, for the law has no greater regard for his interest than it has for that of the debtor.

It is manifest that the words, "depreciating in market value," can have reference only to a security that becomes less valuable in market after it is pledged than it was at the time it was pledged, and that it can have no proper application to a security the marketable condition of which has remained unchanged, but which was, at the time of the pledge, and has remained, worthless. It is true that the pledgee who innocently takes a worthless pledge is as much disappointed in his security and imperiled in his loan as is the pledgee who takes a security that subsequently depreciates in value; but this is precisely the condition of a man who takes a pledge under a mistake of its real value, supposing it to be adequate security when in truth it is not; and yet, in such case, the value of the security remaining the same at all times, no one could

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Opinion of the Court.

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pretend that there is a "depreciating in market value." Because Kretsinger was not authorized to sell the policy upon discovery that this stock was not genuine, it does not follow that he was without remedy. He had what the law regarded as ample remedy, and it was to that, and not to any special remedy provided by the contract, that he was authorized to resort for relief. Moreover, the rule at common law was, that the pledgee must give notice to the pledgor to redeem, before he could sell. 2 Kent's Com. (8th ed.) 759, \*583; *Rozet v. McClellan*, 48 Ill. 345. It is obvious that the purpose of this was different from that of giving notice of sale. It was to inform the pledgor that the pledgee would then proceed to terminate all indulgence—that the pledgor must then act, or his property would be lost,—while notice of the sale was to invite competition, and thereby secure the best price attainable by a sale.

Where a sale is only to be made in event of failure to make payment at maturity of the debt, it may be that the pledgor is not entitled to a demand, for he has himself fixed a definite period for the termination of the pledge, and he should be required to act accordingly; but that reasoning is not applicable where the pledgee elects to sell the pledge before the debt is due, because of the happening of a contingency,—as, for instance, like that here,—of which the pledgor may be in profound ignorance. There, the pledgor may make no effort to redeem, simply because he may not suppose that there is the slightest reason to apprehend his property is in danger of being sold, and upon the plainest principles of justice he is entitled to be notified that he can not wait until the maturity of his debt, but that he must then redeem, if he ever intends to. Jones on Pledges, 607.

The judgment is affirmed.

*Judgment affirmed.*

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Syllabus. Brief for the Appellant.

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ETHAN BRAGG

v.

CHRISTINE OLSON *et al.*

*Filed at Ottawa May 16, 1889.*

1. SPECIFIC PERFORMANCE—*title in litigation.* Where, by the terms of a contract, the vendor is required to make the vendee a warranty deed at the termination of certain litigation concerning the title, the former can not object to a decree, on bill for specific performance, requiring him to convey whatever title he has, although his title has not yet been established in the litigation.

2. LACHES—to defeat a specific performance. Where the purchaser of land in 1863 was let into the immediate possession, and occupied and improved the premises up to his death, in 1867, and his widow and heirs continued in such possession for twenty years or more, it was held, on bill by the widow and heirs for a specific performance of the contract, that the defense of *laches* could have no application.

3. STATUTE OF FRAUDS—must be pleaded. The Statute of Frauds must be pleaded, to be available as a defense.

4. SAME—*part performance—to take a case out of the statute.* The delivery of possession of land by the vendor, the payment of the purchase money and the making of valuable improvements on the premises by the purchaser and his heirs, will take a parol contract of sale out of the Statute of Frauds.

5. PRACTICE—*time to object—want of proper parties—in chancery.* After a decree for the specific performance of a contract for the sale of land between the parties thereto, it will be too late to raise the question that the representatives of a third party, deceased, are necessary parties, no such question having been raised by demurrer, plea or answer in the court below.

APPEAL from the Circuit Court of Warren county; the Hon. JOHN J. GLENN, Judge, presiding.

Mr. ALMON KIDDER, Mr. WILLIAM J. AMMEN, and Mr. GEORGE F. HARDING, for the appellant:

A bill for specific performance can not be maintained upon conflicting testimony, nor unless the terms of the agreement are clearly proven. *Colson v. Thompson*, 2 Wheat. 336; *Carr*

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Brief for the Appellees.

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v. *Duval*, 14 Pet. 77; *Clark v. Clark*, 122 Ill. 388; *McCornack v. Sage*, 87 id. 484; *Insurance Co. v. Rink*, 110 id. 538; *Wood v. Thornly*, 58 id. 464; *Huddleson v. Briscoe*, 11 Ves. 583; *Lunz v. McLaughlin*, 14 Minn. 73; *Waters v. Howard*, 1 Md. Ch. 112.

When the contract is vague or uncertain in its terms, or is not clearly proven, it will not be specifically enforced. *Allen v. Webb*, 64 Ill. 342; *Bowman v. Cunningham*, 78 id. 48; *Long v. Long*, 118 id. 638; *Lakerson v. Stillwell*, 13 N. Y. Eq. 357; *Minturn v. Baylis*, 33 Col. 129; *Stanton v. Miller*, 58 N. Y. 200; *Wallace v. Rappleye*, 103 Ill. 229; *Bailey v. Edmunds*, 64 id. 126; *Hartwell v. Black*, 48 id. 301; *Sands v. Sands*, 112 id. 226; *Fleischman v. Moore*, 79 id. 539; *Hamilton v. Harvey*, 121 id. 469; *Brink v. Steadmaa*, 70 id. 241; *Clark v. Clark*, 122 id. 388; Waterman on Specific Performance, p. 396, sec. 291.

The record fails to show that Olson entered into possession of the land under the alleged verbal contract. This is enough to defeat the bill. *Pickerell v. Morss*, 97 Ill. 220; *Wood v. Thornly*, 58 id. 464; *Worth v. Worth*, 84 id. 442; *Padfield v. Padfield*, 92 id. 198; *Kaufman v. Cook*, 114 id. 11; Fry on Specific Performance, (3d ed.) sec. 557, *et seq.*; Waterman on Specific Performance, p. 375, sec. 274; 3 Washburn on Real Prop. 247, 248; *Clark v. Clark*, 122 Ill. 388; 5 Wait's Actions and Defenses, 800, 801; Wood on Statute of Frauds, chap. 18.

Messrs. BASSETT & BASSETT, for the appellees:

It is well settled in our State, that a verbal contract for the sale of land, where possession was taken under the contract and the contract price paid, will be enforced. The evidence to establish such a contract is only to be reasonably clear and certain. *Deniston v. Hoagland*, 67 Ill. 265; *Adkinson v. Tanner*, 68 id. 247; *Rutherford v. Sargent*, 71 id. 341; *McDowell v. Lucas*, 97 id. 489; *Irwin v. Dyke*, 114 id. 305.

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Opinion of the Court.

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The contract will be upheld and enforced where the preponderance of the evidence, although conflicting, clearly establishes and proves the contract against the oath of the defendant; and what the courts hold to be clear and certain proof, is that which was satisfactory to the chancellor. *Rutherford v. Sargent*, 71 Ill. 341; *Deniston v. Hoagland*, 67 id. 265; *McClure v. Otrich*, 118 id. 227; *Smith v. Yocom*, 110 id. 145.

It is proved, and not disputed, that Olson took possession of the land in 1863, and continued in possession until his death, in 1867, and his widow continued in possession until the trial of the cause, in 1883. During all this time Bragg never asked for the rents, and never claimed that they were tenants under him. This was evidence of a contract of sale. *Fry on Specific Performance*, secs. 397, 400; *Rutherford v. Sargent*, 71 Ill. 345; *Harris v. Knickerbocker*, 5 Wend. 645.

*Laches*, or the Statute of Limitations, does not apply when the complainants are in possession of the land. *Wilson v. Byers*, 77 Ill. 76; *Mills v. Lockwood*, 42 id. 118.

The position taken, that specific performance will not be decreed because the vendor did not have a good title to the land, is not correct. It is only where the vendor has conveyed afterward to third parties who have no notice, that specific performance will not be enforced. It is no difference whether the vendor has a good title or not. He must convey what he has. *Harding v. Parshall*, 56 Ill. 219; *Litsey v. Whittemore*, 111 id. 267.

**Per CURIAM:** This bill, as amended, was by the widow and heirs-at-law of Olof Olson, deceased, against Ethan Bragg, to enforce the specific performance of a contract made in 1862 or 1863, to convey the east half of the north-west quarter of section 20, township 13 north, range 1 west, in Mercer county. It is, among other things, alleged, that it was verbally agreed between said Ethan Bragg and Olof Olson that Olson was to pay Bragg the sum of \$600 for said tract of land, \$200 of

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Opinion of the Court.

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which was paid at or about the date of the agreement, and the remainder was to be paid on the delivery of a general warranty deed by Bragg, when the title then in litigation between said Bragg and one Erskine should be settled, which was expected to be at the next term of court thereafter to be held; that at that time the land was vacant and unimproved prairie land, and Olson then went into possession of it, under the contract, and fenced it, and broke it, and thereafter continued to use, occupy and claim it, under said contract, until his death, in 1867; that prior to the death of Olof Olson he paid Bragg the full amount agreed by the contract to be paid for the land; that since the death of Olof Olson, his widow and children have been in possession, and continued to the present time to occupy and claim the land under the contract, and have made additional improvements and the necessary repairs on the land; that the litigation between Bragg and Erskine in regard to the title has not yet terminated, and a history of the litigation is then recited; and it is further alleged that the widow of Olson has paid out, at the request of Bragg, a considerable sum on account of that litigation.

The allegations of this amended bill were stipulated to be in issue, and the cause then proceeded to a hearing; and thereupon the decree recites, that "the court finds that the allegations of the bill are substantially true; that the defendant, Ethan Bragg, contracted and sold to Olof Olson, in the year 1863, the east half of the north-west quarter of section twenty (20), township thirteen (13) north, range one (1) west, in Mercer county, Illinois, for the sum of \$600, to be paid as soon as the defendant, Bragg, could get the title to said real estate decided, which was then in litigation; that Olof Olson paid the defendant the full amount of the contract price for said real estate, and died, leaving the complainants as his widow and as his only children and only heirs-at-law; that Olof Olson went into the possession of said real estate, under said contract, in the year 1863, and he and his widow and children

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Opinion of the Court.

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continued in possession of the same from that time, and made valuable improvements on the same. The defendant, Ethan Bragg, is therefore ordered to make, execute and deliver to the complainants a deed, conveying said east half of the northwest quarter of section twenty (20), township thirteen (13) north, range one (1) west, in Mercer county, Illinois, to hold as widow and heirs-at-law of Olof Olson, conveying all the title said Bragg had to said real estate in the year 1863, or which he has acquired since that time. And on failure to make such deed in thirty days, then the master in chancery of Warren county is ordered and empowered to make a deed to said complainants, conveying all the title of said defendant, as aforesaid, in and to said premises."

The objections to the decree present, in the main, but questions of fact, and no useful end can therefore be subserved by the statement here, at large, of our reasons for coinciding with the views thereon of the circuit court. It is sufficient that we have carefully considered the evidence, and that, after having done so, we do not feel authorized to hold that the circuit court is clearly in error in its findings of facts. Harding was not a party to the contract, and it is now too late to raise the question that his representatives are necessary parties to this proceeding, no question in that respect having been raised, by demurrer, plea or answer, in the court below. *Manufacturing Co. v. Wire Fence Co.* 109 Ill. 71; *Gibbs v. Blackwell*, 37 id. 191; *Willard v. Taylor*, 8 Wall. 557.

It does not lie in the mouth of Bragg to object to conveying what title he has. *Harding v. Parshall*, 56 Ill. 219; *Litsey v. Whittemore*, 111 id. 267.

Olson having been let into possession, as the evidence shows, under the contract, and having remained in possession until his death, and his widow and heirs having been in possession, in his right, ever since, the defense of *laches* can have no application. *Chicago and Eastern Illinois Railroad Co. v. Hay et al.* 119 Ill. 502; *Whitsitt v. Trustees of Presbyterian Church*,

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Syllabus.

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110 id. 125; *Wilson v. Byers*, 77 id. 76; *Mills v. Lockwood*, 42 id. 118.

The Statute of Frauds was not pleaded as a defense, but even if it had been, concurring, as we do, with the circuit court in its findings of facts, there was sufficient part performance shown to take the case out of the statute.

The decree is affirmed.

*Decree affirmed.*

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THE CHICAGO WEST DIVISION RAILWAY COMPANY

v.

WILLIAM A. BECKER, Admr.

*Filed at Ottawa May 16, 1889.*

1. EVIDENCE—declarations of person injured—in suit to recover for the injury—whether of the *res gestæ*. In an action against a city railway company to recover damages for personal injury to plaintiff's intestate, a boy, causing his death, it was claimed that the boy was thrown from a car and run over. After the boy had got up and walked to the sidewalk and had sat down, he stated, in answer to a question as to what was the matter, that the conductor threw him off the car. These statements were admitted in evidence: *Held*, that the court erred in admitting evidence of such statements, as they were not a part of the *res gestæ*.

2. The declarations of a party before his death, not made at the time of the accident in which he received the injury causing his death, nor concurrently therewith, and which fail to explain or characterize the manner in which the accident occurred, are not admissible in evidence.

3. The true inquiry is, whether the declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history, or a part of a history, of a completed past affair. In the one case it is competent, in the other it is not.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN P. ALTGELD, Judge, presiding.

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Briefs of Counsel. Opinion of the Court.

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Mr. W. B. KEEP, Mr. EDMUND FURTHMANN, and Mr. H. H. MARTIN, for the appellant:

The test for the admission of declarations as a part of the *res gestæ* is, that they must be so intimately interwoven or connected with the principal fact or event which it characterizes, as to be regarded as a part of the transaction itself. *Lund v. Tyngsborough*, 9 Cush. 36; *Lander v. People*, 104 Ill. 248; *Waldele v. Railroad Co.* 95 N. Y. 275; *Worden v. Powers*, 37 Vt. 619; *Sullivan v. Railroad Co.* 12 Ore. 393; *Kendrick v. State*, 55 Miss. 436; *Cramer v. State*, 61 id. 438.

The rule as to the admissibility of declarations in such cases is shown in *Williamson v. Railroad Co.* 114 Mass. 148; *Martin v. Railroad Co.* 103 N. Y. 626; *State v. Pomeroy*, 25 Kan. 349; *Railroad Co. v. Mara*, 26 Ohio St. 185; *Bins v. State*, 57 Ind. 46; *Commonwealth v. James*, 99 Mass. 438; *Adams v. Railroad Co.* 74 Mo. 553; *State v. Brown*, 64 id. 367; *Forrest v. State*, 21 Ohio St. 641; *People v. Ah Lee*, 60 Cal. 85; *Roosa v. Loan Co.* 132 Mass. 439; *Ceder v. Talbott*, 14 W. Va. 277; *Annil v. Railroad Co.* 70 Iowa, 130; *Railroad Co. v. O'Brien*, 119 U. S. 99; *Railroad Co. v. Hawk*, 72 Ala. 112.

Messrs. CAMPBELL & CUSTER, for the appellee:

The declarations of the intestate made immediately after the injury were properly admitted in evidence. 1 Greenleaf on Evidence, (14th ed.) sec. 108; *Railway Co. v. Howard*, 6 Bradw. 569; *Commonwealth v. Hackett*, 2 Allen, 136; *Elkins v. McKean*, 79 Pa. St. 493; *Insurance Co. v. Moseley*, 8 Wall. 397; *Entwhistle v. Feigner*, 60 Mo. 214; *Harriman v. Stowe*, 57 id. 93; *Brownell v. Railway Co.* 47 id. 239.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is an action on the case, brought in the Superior Court of Cook County by the appellee, as administrator, to recover damages for the death of his son Henry J. Becker, a boy between eight and nine years of age, against the appellant com-

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Opinion of the Court.

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pany, which operates a street railway on Blue Island Avenue in the West division of the city of Chicago. Verdict and judgment in the trial court were in favor of the plaintiff. The case is brought here by appeal from the Appellate Court, which affirmed the judgment of the Superior Court.

The boy died on November 29, 1885. The injuries, which caused his death, were received about eight o'clock in the evening of November 28, 1885, on Blue Island Avenue near its intersection with Henry street, and were caused by one of appellant's street cars going southward on Blue Island Avenue. It is charged in the declaration that the conductor of the car pushed the deceased from the front platform, and that the car ran over him.

No witness was produced on either side, who saw the accident, or could testify to the manner in which it occurred. The only testimony in support of the theory that the boy was pushed or thrown from the car, is that of two witnesses, who swear to the declarations made by the boy himself after he was hurt. Two lads named Custy and Burke, the oldest of whom was seventeen years old, were passing along Henry street across Blue Island Avenue when they saw the boy, and noticed that he was injured. Custy says: "I saw the boy on the street; he was on his feet and walked towards the sidewalk; I went to him and asked him what was the matter; he said the conductor took him by the arm and shook him off the car." Burke says: "We were going up on Blue Island Avenue and we saw a little fellow getting up; we ran over to him and asked him what was the matter, and he says the conductor caught him by the arm and threw him off the car." The car had passed on "about a lot south of Henry street," and was going "at a good speed."

Blue Island Avenue is eighty feet wide. The boy rose from the ground in the middle of the street, and walked to the sidewalk on the east side of the street, and sat down. The evidence of Custy tends to show, that the deceased made the

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Opinion of the Court.

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statement about his being thrown from the car, while he was on his way to the side-walk. The evidence of Burke, however, is quite positive to the effect, that the statement was made after the sidewalk was reached. The testimony of Magdalene Elbe tends to confirm what Burke says upon this subject.

The proof as to the declarations of the deceased was admitted by the trial court over the objection of the defendant below. The ruling was excepted to. When the plaintiff rested, the defendant moved to exclude the testimony from the jury, and filed its motion in writing. The motion was overruled, and exception was taken.

We think, that the admission of proof as to what was said by the deceased, under the circumstances thus detailed, was erroneous. The declarations were not a part of the *res gesta*. They were not made at the time of the accident, nor did they explain or characterize the manner in which the accident occurred. They were not concurrent with the injury, nor uttered contemporaneously with it so as to be regarded as a part of the principal transaction. They were made after the injury was received and were merely narrative of what had taken place. They were spoken by the deceased as his answer, when he was asked "what was the matter." The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history or a part of a history of a completed past affair. In the one case it is competent, in the other it is not. (*Mayes v. The State*, 64 Miss. 329; *Waldele v. N. Y. C. & H. R. R. R. Co.* 95 N. Y. 274; *Lander v. The People*, 104 Ill. 248.)

For the error in admitting testimony as to the declarations made by plaintiff's intestate, the judgments of the Appellate and Superior Court are reversed, and the cause is remanded to the Superior Court.

*Judgment reversed.*

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Syllabus. Brief for the Appellants.

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JAMES K. FISHER *et al.*

v.

EGBERT L. JANSEN.

128	549
58a	285
128	549
163	314
60a	615
128	549
188	1310

*Filed at Ottawa May 16, 1889.*

1. **MEASURE OF DAMAGES—*in action for personal injury—resulting from negligence.*** In an action to recover for a personal injury caused by negligence, it is not competent for the plaintiff to prove what he had made in business prior to his injuries. What any business man, however competent and skilled, might make in the future in any kind of trade, is too much a matter of speculation and contingency to be susceptible of direct evidence.

2. A party personally injured from negligence, may recover of the defendant damages for his inability to labor or transact business in the future, resulting from his injuries, without any evidence of his success in business prior to his injury, or the extent of his earnings. Direct proof of any specific pecuniary loss is not indispensable to a recovery.

3. In an action by a plaintiff aged about fifty-three years, and temporarily not engaged in business, to recover for personal injuries inflicted through negligence, the court instructed for the plaintiff, in substance, that if the jury found, from the evidence, that the plaintiff was entitled to recover any damages, the jury had a right to and should take into consideration all the facts and circumstances in evidence before them, and that they might consider the nature and extent of the plaintiff's injuries, if any, testified about by the witnesses; his pain and suffering, if any, resulting from such injuries; the permanent disability, if any, caused by said injuries; the money necessarily paid, if any, by the plaintiff in and about endeavoring to be healed or cured of said injuries; and any future pain or suffering, or future inability to labor or transact business, if any, that the jury may believe, from the evidence, the plaintiff would sustain by reason of injuries received. There was no direct proof of the earning ability of the plaintiff: *Held*, that there was no error in the instruction.

**APPEAL from the Appellate Court for the First District;**—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. FLOWER, REMY & HOLSTEIN, for the appellants:

The second of plaintiff's instructions was erroneous. Instructions only that are based on the evidence should be given.

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Brief for the Appellee.

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If not so based it is error, though they may contain certain abstract propositions. *Railroad Co. v. Lewis*, 109 Ill. 120; *Coughlin v. People*, 18 id. 266; *Bank v. Eldred*, 9 Wall. 544; *Ewing v. Runkle*, 20 Ill. 448; *Fidler v. McKinley*, 21 id. 308; *Wenger v. Calder*, 78 id. 275; *Waldron v. Marcier*, 82 id. 551; *Sewing Machine Co. v. Layman*, 88 id. 39; *Frantz v. Rose*, 89 id. 591; *Martin v. Johnson*, id. 587; 2 Thompson on Trials, sec. 2315, p. 1671.

There is manifest error in the second instruction given by the court at the request of the appellee,—that is to say, in that part of it that instructs the jury, that in assessing damages "they may consider \* \* \* future inability to labor or transact business," because there was no evidence of any loss on account of future inability to labor or transact business, or of the value of appellee's time. *Jaques v. Railroad Co.* 41 Conn. 61; *Railroad Co. v. Hazzard*, 26 id. 373; *Joliet v. Conway*, 119 id. 489; *Skinner v. Church*, 36 Iowa, 91; *Tilley v. Railroad Co.* 24 N. Y. 471; 29 id. 252; *McIntire v. Railroad Co.* 37 id. 258; *Leeds v. Gas Light Co.* 90 id. 26; *Walker v. Railroad Co.* 61 Barb. 260; *Grant v. Brooklyn*, 41 id. 381; *Ehr Gott v. Mayor*, 96 N. Y. 275.

Mr. E. A. OTIS, for the appellee:

No case can be cited which goes to the extent of permitting evidence of past profits in business, to show the probable value of personal services. *Masterton v. Mt. Vernon*, 58 N. Y. 395; *Lincoln v. Railroad Co.* 23 Wend. 425; *Walker v. Railroad Co.* 63 Barb. 260; *Nebraska City v. Campbell*, 12 Black. 590; *Ballou v. Farnam*, 11 Allen, 73.

That plaintiff was entitled to recover damages for his future disability to transact his business, see *Scott v. Montgomery*, 95 Pa. St. 444; *Ballou v. Farnam*, 11 Allen, 73; *Railroad Co. v. Warner*, 108 Ill. 538; *Chicago v. Major*, 18 id. 349; *Bridge Association v. Loomis*, 20 id. 236; *Railroad Co. v. Otto*, 52 id.

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Opinion of the Court.

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416; *City v. Martin*, 49 id. 246; *Joliet v. Conway*, 119 id. 489; 3 Sutherland on Damages, 261.

The rule of the Illinois courts is most fully sustained by the weight of authority everywhere. Shearman & Redfield on Negligence, (4th ed.) sec. 758, and notes; *Scott v. Montgomery*, 95 Pa. St. 444; *Canal v. Graham*, 63 id. 290; 2 Thompson on Negligence, pp. 1256, 1257, and cases cited.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellee received severe and permanent injuries through the negligence of the servant of the appellants in charge of an elevator used by them for the convenience of the Beaurivage flats, of which they were in possession.

The question of appellants' liability is settled by the judgments below, and the only question presented for our determination, upon this appeal, is, whether the second instruction given at the instance of appellee is correct. That instruction is as follows:

"In determining the amount of damages which the plaintiff is entitled to recover in this case, (if the jury find, from the evidence, under the instructions of the court, he is entitled to recover any damages,) the jury have a right to, and should, take into consideration all the facts and circumstances in evidence before them; and they may consider the nature and extent of the plaintiff's injuries, if any, testified about by the witnesses in this case; his pain and suffering, if any, resulting from such injuries; the permanent disability, if any, caused by said injuries; the money necessarily paid, if any, by the plaintiff, in and about endeavoring to be healed or cured of said injuries; and any future pain or suffering, or future inability to labor or transact business, if any, that the jury may believe, from the evidence, the plaintiff will sustain by reason of injuries received."

The contention of counsel who argue on behalf of appellants is, that there is no evidence in the record of the "earning abil-

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Opinion of the Court.

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ity" of appellee, and that it was therefore error to say to the jury that they could take into consideration his permanent disability, and consequent future inability to labor or transact business.

The evidence tends to prove that at the time appellee was injured he was a little over fifty-three years old; that he had gone into the book business, in Chicago, when a boy, and continued therein until in January, 1886,—clerking from 1848 until 1856, a partner in the firm of S. C. Griggs & Co. from 1856 until 1872, and a partner in the firm of Jansen, McClurg & Co. from 1872 until January, 1886. At the last named date he had broken down in health from overwork, but he immediately thereafter spent several months in travel and recreation in Kansas and California, and at the time of receiving the injury was comparatively restored to his former health. The evidence shows the character of the injuries, and that appellee had paid about \$1000 for nursing, physicians' bills, etc., in consequence of those injuries.

It is manifest that it would have been incompetent to have proved what he had made in business prior to his injuries, since that was the result of circumstances that might never be repeated. He had no employment at fixed wages for the future, and he is not shown to have possessed peculiar skill or knowledge, having a definite pecuniary value, which was destroyed or affected by his injuries. What he or any other business man, however competent and skilled, might make in the future, in any line of trade, is too much a matter of speculation and contingency to be susceptible of direct evidence. It follows, therefore, that appellee gave all the evidence of the damages he has sustained on account of his permanent disability and consequent future inability to labor or transact business of which that question is susceptible. The inquiry, then, must be, whether, under such circumstances, a person is entitled to recover any damages because of inability to labor or transact business in the future, resulting from his injuries.

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Opinion of the Court.

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We think, very clearly, that he is entitled to recover,—that it can upon no principle make any difference whether a person is, at the time he is injured, engaged in a business paying a definite amount, or is then not engaged in business, but is by the act of injury, prevented from engaging in business in the future, in which he might reasonably expect, but not be entirely certain, that he would have success.

In *City of Chicago v. Major*, 18 Ill. 349, action was brought against the city for negligence, resulting in the death of a child four years old. There was no proof that he had ever earned anything, and, necessarily, it was purely conjectural whether he ever would have earned anything, had he lived and been uninjured by the city's negligence. The court, among other things, instructed the jury, that in determining the extent of pecuniary loss it was not necessary that any witness should have expressed an opinion as to the amount, but that the jury might themselves make such an estimate from the facts proved, taking into consideration the age of the deceased, and such other evidence as might afford them the means of making the estimate. This was held to be proper, the court observing: "In this, as in all other cases, it was proper for the jury to exercise their own judgment upon the facts in proof, by connecting them with their own knowledge and experience, which they are supposed to possess in common with the generality of mankind." See, also, to like effect, *Chicago v. Scholten*, 75 Ill. 471.

*Illinois Central Railroad Co. v. Read*, 37 Ill. 484, was an action for injuries received by the plaintiff by reason of the negligence of the defendant. The particular injury was to the right hand of the plaintiff, by scalding. There does not appear to have been any evidence as to wages the plaintiff had earned or could thereafter earn. One of the instructions given in behalf of the plaintiff, and excepted to by the defendant, was this: "In estimating the plaintiff's damages, it is proper for the jury to estimate the effect of the injury in future upon the

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Opinion of the Court.

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plaintiff's health, if any, the use of his hand, and his ability to attend to his affairs, generally, in pursuing his course of life, and the bodily pain and suffering, the necessary expenses of medical care and loss of time, and all damages, present and prospective, which can be treated as a necessary result to the injury inflicted by the collision upon the plaintiff in this action." The main argument was upon a different question, and upon that the case was reversed; but this instruction was objected to, and the court held it was free of error, saying: "As to the instructions for appellee, we perceive no inconsistency or error in them."

It was said, *arguendo*, in *Peoria Bridge Association v. Loomis*, 20 Ill. 252: "The rule of damages for personal injury inflicted by negligence is, loss of time during the cure, and expense incurred in respect of it, the pain and suffering undergone by plaintiff, and any permanent injury, especially when it causes a disability from future exertion, and consequent pecuniary loss." And this was, in the same way, repeated in *City of Chicago v. Martin et ux.* 49 Ill. 246; and the identical language was embodied in an instruction, which was approved, in *Chicago, Rock Island and Pacific Railroad Co. v. Otto*, 52 Ill. 416. It is true that nothing is said in *Peoria Bridge Association v. Loomis*, nor in *City of Chicago v. Martin*, in respect to the specific proof required; and in *Chicago, Rock Island and Pacific Railroad Co. v. Otto*, it does not appear, from the report of the case, what was the evidence before the jury. But in *Chicago, Burlington and Quincy Railroad Co. v. Warner*, 108 Ill. 538, which was an action for injuries sustained through the negligence of the defendant, the same instruction, in substance, was given, and it was objected by counsel for appellant that "there was no evidence that the loss of Warner's arm did or would impair his ability to pursue his business, much less of the extent to which said ability would be lessened," and we held, conceding the facts, that the objection was untenable, saying, among other things: "At the time of receiving the

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Opinion of the Court.

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injury his business was that of railroading. He had made his way up from a brakeman to a conductor of a freight train. By reason of the accident he lost his position as an employe of the company, and it is manifest, from the loss of the arm itself, that he could not successfully, if at all, follow that business any longer; and the fact he was forced to abandon it was before the jury. That both arms are useful in all, and indispensable in most, of the avocations in life, is but a part of the common information of mankind in general, and hence it required no other proof to establish it. With these facts before the jury, it is difficult to understand by what process of reasoning the conclusion is reached, there was no evidence upon which to found the instruction, so far as it related to the impairment of appellee's ability to pursue his ordinary business by reason of the loss of his arm." There was not there, as there is not here, any evidence of what the plaintiff was earning, or what he could have earned but for the loss of his arm; nor was there any evidence of what he could or could not do after he was injured; and there is here the same evidence that the plaintiff was prevented from resuming his old or any new business, that there was there that the plaintiff was compelled to abandon the business he was in. Here, even more than there, it is clear, from the evidence, that the plaintiff could not successfully resume or prosecute any business requiring any degree of physical exertion. That case is conclusive that direct proof of any specific pecuniary loss is not indispensable to a recovery, and, as has been seen, it but follows *City of Chicago v. Major, Illinois Central Railroad Co. v. Reed, supra*, and the other decisions based on like principle.

We think the Appellate Court properly affirmed the judgment of the Superior Court, and its judgment is therefore affirmed.

*Judgment affirmed.*

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Syllabus.

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128	556
33a	437
128	556
35a	93
128	556
41a	164
128	556
153	642
128	556
50a	549
51a	55
51a	590
128	556
166	594

ALBERT L. SERCOMB

v.

CHARLES CATLIN, Receiver.

*Filed at Ottawa May 16, 1889.*

1. **RECEIVER—property in another jurisdiction—powers of a receiver.** The general rule is, that the powers of a receiver are co-extensive with the jurisdiction of the court which appoints him. He has no extra-territorial power of official action. But a receiver appointed in one State may, by comity, be permitted to recover the possession of property in another State, provided no citizen or suitor of the latter State is thereby prejudiced or injured.

2. **SAME—interfering with property—after appointment of receiver—even before possession taken—power of the court.** After the appointment of a receiver of all the effects and property of A & B, an insolvent firm, C, the business manager of a foreign corporation having a branch office in this State, caused an attachment to be issued in Washington City, D. C., in favor of his corporation, against A & B, for a debt, and had the same levied on a stock of jewelry which A & B had, shortly before the appointment of the receiver, consigned to an auctioneer in Washington. C refused to dismiss the attachment suit, as directed by the court, whereupon the court adjudged C to be guilty of a contempt of court, and ordered his arrest and imprisonment: *Held*, that the court had the power to make the order of imprisonment.

3. Although the receiver of an insolvent firm or corporation may not have reduced to his possession the property and assets of the insolvents, this will not authorize any creditor to take legal steps against the property vested in the receiver, who is the officer of the court. Even if the property is in another State, this will not authorize a resident of this State to attach the same, as this will interfere with the receiver's taking possession.

4. **CONFLICT OF LAWS—extra-territorial effect of decree—as to property in another jurisdiction.** Where a court of equity has jurisdiction over the person of a defendant, it may make its decrees and orders affecting his property which is situated outside of its jurisdiction, and enforce obedience to them by imprisonment.

5. **CONTEMPT—proceedings against corporations.** A corporation can only be punished for contempt, through its officers, or those acting in aid of it. The court may proceed against the corporation or against its officers who do the act interfering with the proceedings of the court, or who had the control of the action of the corporation.

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Brief for the Appellant.

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APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. EGEBERT JAMESON, Judge, presiding.

Messrs. FLOWER, REMY & HOLSTEIN, for the appellant:

Catlin was not an assignee under a voluntary assignment, a national bankrupt act, or under the State insolvent laws. He is merely a receiver under a judgment creditor's bill.

Of all conveyances by mere operation of law, in cases of bankruptcy, insolvency or receiverships *in invitum*, the weakest title is that of a receiver under a creditor's bill. A receiver under a creditor's bill is appointed for the benefit of one or more creditors, to the prejudice and exclusion of all other creditors of the debtor, while an assignee in bankruptcy or insolvency is appointed for the benefit of all creditors equally. We need not multiply authorities upon this proposition. The distinction we have suggested is universally recognized by the authorities. The Supreme Court of this State, in a very recent case, recognizes it. See *May v. National Bank*, 122 Ill. 551; *Burrill on Assignments*, (5th ed.) sec. 303; *Story on Conflict of Laws*, (8th ed.) sec. 411, p. 573.

What are the rights and powers of Catlin, as receiver? First, a receiver appointed under a creditor's bill is merely an officer of the court appointing him, and his rights and powers as such are determined, measured and limited by the jurisdiction of that court.

Neither the laws of a State nor the orders of its courts have any force or effect, *proprio vigore*, beyond its territorial limits. The appointment of Catlin as receiver by the Superior Court, under a creditor's bill, against Clapp & Davies, residents of Illinois, did not vest in said receiver the property of Clapp & Davies situate in other States or Territories beyond the jurisdiction of the court. *Booth v. Clark*, 17 How. 322; *Rhawn v. Pearce*, 110 Ill. 350; *May v. National Bank*, 122 id. 551.

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Brief for the Appellee.

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In the case of *Olney v. Tanner*, United States District Judge BROWN of New York says: "Upon the authority of the case of *Booth v. Clarke*, 17 How. 322, I think there is much doubt whether the complainant, as a receiver, an officer of a State court, has any such standing in a court of the United States sitting in bankruptcy, as entitles him to its aid in a case like this, seeking a preference in contravention of the intent and policy of the Bankrupt act. Outside of the jurisdiction which appoints him, a receiver is not ordinarily entitled to maintain suits except by comity, and this comity does not extend to aiding preferences sought to be acquired by statutory assignments or other proceeding *in invitum*, to the detriment of other creditors whose interests are in the keeping of foreign or independent tribunals." *Booth v. Clarke*, 17 How. 322; *Brigham v. Luddington*, 12 Blatchf. 237; *Chandler v. Siddle*, 10 N. B. 236; *Willets v. Waite*, 25 N. Y. 576; *Hout v. Thompson*, 5 id. 320; *Runk v. St. John*, 29 Barb. 585; *High on Receivers*, sec. 156; *Betton v. Valentine*, 1 Curt. 168; *Hazard v. Durant*, 19 Fed. Rep. 471; *Keller v. Paine*, 107 N. Y. 83; *Green v. Van Buskirk*, 3 Wall. 458; 5 id. 307; 7 id. 189; *Guillander v. Howell*, 35 N. Y. 657; *Warren v. Jaffray*, 96 id. 248; *Beach on Receivers*, secs. 254, 255, 680, and notes; *Insurance Co. v. Taylor*, 2 Robt. 278; 16 Fed. Rep. 725.

Messrs. KRAUS, MAYER & STEIN, for the appellee:

If the Meriden Britannia Company was proceeded against, the order of the court could have been enforced only through its agent, Sercomb. *Franshaw v. Tracy*, 4 Biss. 490; *People v. Railroad Co.* 14 Abb. Pr. 171.

Rorer on Inter-State Law (p. 42) says: "The authority of courts of one State to restrain, by injunction, persons within its jurisdiction from prosecuting suits, either in the courts of such State or in courts of other States, against persons or property there situate, of persons resident in the State where the injunction is asked, is fully asserted, not by way of interference

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Opinion of the Court.

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with the course of proceedings or jurisdiction of courts of other States, (for to this end a court has no power,) but upon the principle that courts of equity have full power over persons within their jurisdiction and amenable to their process, to restrain them from proceeding, either within or without the State, to do acts which are wrongful toward other residents, and therefore contrary to equity and good conscience."

This doctrine is now uniformly asserted by the courts of this country and England. *High on Injunctions*, (2d ed.) secs. 103-106; 2 Story's Eq. Jur. secs. 896-900; *Massie v. Watts*, 6 Cranch, 148; *Alexander v. Tolleston Club*, 110 Ill. 65; *Dehon v. Foster*, 4 Allen, 545; 7 id. 57; *Keyser v. Rice*, 47 Md. 203; *Chaffee v. Quidnick Co.* 13 R. I. 442; *Railroad Co. v. Railroad Co.* 46 Vt. 792; *Engel v. Scheuerman*, 40 Ga. 206; *Hendee v. Railroad Co.* 26 Fed. Rep. 677; *MacGregor v. MacGregor*, 9 Iowa, 65; *Manufacturing Co. v. Worster*, 23 N. H. 462; *Briggs v. French*, 1 Sumner, 504; *Deklyn v. Watkins*, 3 Sandf. Ch. \*185; *Claflin v. Hamlin*, 62 How. Pr. 284; *Vail v. Knapp*, 49 Barb. 299; *Snook v. Snetzer*, 25 Ohio St. 516; *Dinsmore v. Neresheimer*, 32 Hun, 204; *Richards v. People*, 81 Ill. 551; *Patterson v. Lynde*, 112 id. 196; *Railroad Co. v. Packet Co.* 108 id. 317; *Heyer v. Alexander*, id. 385; *Cole v. Young*, 24 Kan. 435.

**Mr. JUSTICE MAGRUDER** delivered the opinion of the Court:

This is an appeal from a judgment of the Appellate Court of the First District affirming an order of the Superior Court of Cook County for the arrest and imprisonment of the appellant on account of his alleged contempt of court. On April 14, 1887, in the case of *Ada S. Havens et al. v. Caleb Clapp et al.* then pending in said Superior Court, the appellee was appointed receiver of all the property and effects, real and personal, of the defendants therein, Caleb Clapp and Thomas Davies. Prior to that date Clapp & Davies had forwarded, on

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Opinion of the Court.

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consignment, to Elijah E. Newton, an auctioneer and commission merchant in Washington City in the District of Columbia, a lot of jewelry, watches and silverware to be by him disposed of for their benefit. So far as appears to the contrary, the goods so consigned were still in the possession of Newton at Washington when the order was entered on April 7, 1888, for the commitment of appellant for contempt.

Within a week or ten days after his appointment as receiver, appellee gave notice of such appointment to Newton and demanded a return of the goods. On May 18, 1887, The Meriden Britannia Company, a corporation organized under the laws of the State of Connecticut, being a creditor of Clapp & Davies, commenced an attachment suit against them for the amount of its claim in the Supreme Court of the District of Columbia, and attached the goods in the hands of Newton.

When appellee was appointed receiver, and for a long time prior thereto, The Meriden Britannia Company did business in the city of Chicago, and had a branch office there. The business manager of the company in Chicago was then, and is now, the appellant, Sercomb. The appellant began the attachment suit in Washington on behalf of the company, making the affidavit necessary to procure the attachment, and caused the property in the possession of Newton to be attached. The affidavit so made by him was sworn to before a Notary Public in Chicago. Appellant had full knowledge of appellee's appointment as receiver before the attachment suit was commenced.

On May 31, 1887, appellee as receiver filed his petition in the case of *Havens et al. v. Clapp et al.*, setting up substantially the foregoing facts, and claiming to be the owner of the goods in Washington, and praying for an order upon Sercomb, as manager of said company, to show cause why he should not be attached for contempt in prosecuting the attachment suit and thereby interfering with property belonging to an officer of the court. Appellant appeared and filed a general de-

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Opinion of the Court.

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murrer to the petition. The demurrer being overruled, he elected to stand by it. Thereupon, on June 15, 1887, an order was entered requiring him to furnish proof to the court on June 24, 1887, of having dismissed the attachment suit, and, in default of so doing, that he show cause by ten o'clock on June 25, 1887, why he should not be attached for contempt. The case was then taken to the Appellate Court by writ of error, and the writ was there dismissed because the order of June 15, 1887, was not a final order. After due notice a copy of such judgment of dismissal was filed in the Superior Court, and the proceeding was there reinstated.

Appellee again filed his petition in the Superior Court on April 5, 1888, setting up the previous proceedings as above detailed, charging the failure of Sercomb to obey the order of June 15, 1887, and praying that he show cause by April 7, 1888, why he should not be punished for contempt, etc. To this petition also appellant demurred, and stood by his demurrer upon its being overruled. Thereupon the final order of April 7, 1888, heretofore referred to, was entered.

Under the facts thus stated, did the commencement and prosecution of the attachment suit by Sercomb, as manager of the Meriden Britannia Company, and his refusal to dismiss it as he was required to do by the order of the Superior Court, amount to a contempt of court?

If Sercomb himself had owned the claim sued upon in the attachment suit, and had begun that suit in Illinois, he would have been guilty of contempt upon the authority of the case of *Richards v. The People*, 81 Ill. 551. There, in a suit against a railway company, the circuit court of DeWitt county appointed one Wright receiver of the real and personal property and choses in action of the company. Richards, knowing of such appointment, recovered judgments against the company before a justice of the peace in Champaign county, and garnisheed certain persons, who held funds belonging to the company. He continued the prosecution of the suits after

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Opinion of the Court.

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being informed of an injunction, issued against such prosecution and directed to his attorney but not to himself. He claimed that he was not guilty of contempt because the funds in question had not been taken possession of by the receiver; but this claim was not sustained, and his conduct in the prosecution of the garnishee proceedings was held to be a contempt of court. Although the funds had not been reduced to possession by the receiver, the title thereto had vested in him by virtue of his appointment, and such funds could not be seized or attached by creditors of the original debtor with impunity. It was there said: "It is to be remembered that the receiver is the officer of the court and that his possession is the possession of the court itself, and any unauthorized interference therewith, either by taking forcible possession of the property committed to his charge, or by legal proceedings for that purpose without the sanction of the court appointing him, is a direct and immediate contempt of court, and punishable by attachment. \* \* \* It can make no difference in the application of the rule, whether the property is actually or only constructively in the receiver's possession."

The case at bar differs, however, from the Richards case in that, here, the property attached was not in Illinois, but in the District of Columbia. It is insisted by counsel for appellant that the appellee receiver would not be permitted to go into the foreign jurisdiction to get possession of the property in Newton's hands. Undoubtedly the general rule is, that the powers of a receiver are co-extensive only with the jurisdiction of the court which appoints him. (*C., M. & St. P. Ry. Co. v. Packet Co.* 108 Ill. 317.) He has no extra-territorial power of official action. But a receiver appointed in one State may, by comity, be permitted to recover the possession of property in another State, provided no citizen or suitor of the latter State is thereby prejudiced or injured. (High on Recvs. sec. 47; *Hunt v. Columbian Insurance Co.* 55 Me. 290; *Hoyt v. Thompson*, 5 N. Y. 320; *Hoyt v. Thompson*, 19 N. Y. 207.)

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Opinion of the Court.

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If appellant had not caused the attachment suit to be brought against the goods in Newton's hands, it does not appear that appellee would not have been allowed to enforce his rights against those goods in the District of Columbia. It is not shown that such action on his part would have injured any citizen or suitor in the District. Newton himself may have eventually surrendered the property to appellee without suit.

It is also said, that, if the appellee should intervene in the attachment suit in the District of Columbia, and set up his claim to the property by virtue of his appointment as receiver, he could not prevail in that suit as against the Meriden Britannia Company, the attaching creditor, upon the general ground that any statutory or judicial proceeding in one State, by which trustees, assignees or receivers are appointed to take possession of the property of insolvent debtors *in invitum*, will not be enforced in another State, and that the property taken under such proceeding is subject to the equities of foreign creditors. (*Rhawn v. Pearce*, 110 Ill: 350.) This doctrine has no bearing upon the question involved in the present controversy. The question is not whether appellee by intervening in the foreign suit could be successful therein against the attaching creditor. The question is whether appellant has been guilty of interfering with an officer of the court by causing the attachment suit to be commenced. It is true that the property attached is beyond the jurisdiction of the courts of this State, but the appellant, who caused it to be attached, is in this State and within the jurisdiction of its courts. If the Superior Court had no power to reach the goods in Newton's hands, it had the power to reach appellant, who sought to prevent its receiver from getting possession of the goods. It makes no difference that the property was in a foreign jurisdiction.

In the *Richards* case, Richards brought suit in Illinois to get hold of a fund in Illinois belonging to Wright receiver, and his act was contempt of court because it interfered with the

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Opinion of the Court.

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receiver, and prevented him from reaching such fund. Appellant brings suit in the District of Columbia to get hold of property there belonging to the appellee receiver. His act is just as much an interference with the receiver as though the property was in Illinois. If the attaching creditor can succeed in the foreign suit as against appellee, then the effect of the suit is to take the property from the appellee. If appellee, by intervening in such suit, should defeat the attaching creditor, he will have been forced by the appellant to make a contest for what he may have obtained without a contest. In either case the officer of the court is interfered with in the discharge of his trust.

"Where a court of equity has jurisdiction over the person of a defendant, it is familiar learning that it may make decrees and orders affecting his property which is situated outside of its jurisdiction." (Beach on Receivers, sec. 243.) In *Langford v. Langford*, 5 L. J. (N. S.) Ch. 60, which was an equity proceeding in England, where a receiver had been appointed over an estate in Ireland, and where the tenants on the estate had been notified to pay the rents to the receiver, Lord Langford, the defendant in the cause, attempted to collect the rents himself on the ground that the order appointing the receiver was of no force and effect in Ireland; and his course in this regard was held to be contempt of court. It was there said, that the English court had not the means of sending its officers to carry into effect its orders in Ireland, but it had jurisdiction over all persons in England, and could compel obedience to its orders.

In *Chaffee v. Quidnick Company*, 13 R. I. 442, a court of equity in Rhode Island, in a proceeding there pending, appointed one Farnsworth receiver of the property of the Quidnick company, and directed him to collect certain monies belonging to the company in the hands of Harding, Colby & Co. in New York. Certain attorneys, who had acted as counsel for the defendants in this proceeding, and had assisted in

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Opinion of the Court.

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framing the order appointing the receiver, had a claim against the Quidnick Company for fees. One of them was a resident of Massachusetts and one of New York. In order to collect their fees they began suit against the Company in a court in New York, and attached the funds in the hands of Harding, Colby & Co. The Rhode Island court, upon being informed of the facts through a petition filed by the receiver, held that the attorneys had obstructed and interfered with the receiver by bringing the suit in New York, and were guilty of contempt, notwithstanding the fact that the attached funds were outside the jurisdiction of the Rhode Island court. (See also *Dehon v. Foster*, 4 Allen, 545; *Vermont R. R. v. Vermont R. R.* 46 Vt. 792.)

In the case at bar, the appellant was not a party to the original suit, in which appellee was appointed receiver, and did not occupy any such relation to that suit, as was sustained by Lord Langford in the English case, and by the attorneys in the Rhode Island case, to the suits in which they were respectively adjudged to be guilty of contempt. But the position of appellant here is exactly the same as was that of Richards in the case of *Richards v. The People*, *supra*. Richards was not a party to the original proceeding in which Wright was appointed receiver. It only appears that he was within the jurisdiction of the Illinois court. The injunction was not issued until the Receiver had reported to the court that the garnishee proceedings had been instituted.

It is said that the appellant should not be held to be guilty of contempt for refusing to dismiss a suit, in which he himself was not the plaintiff, but in which the Meriden Britannia Company was plaintiff. It is true that the latter company is a Connecticut corporation. But when the attachment suit was begun, the company could be brought into court, under our statute, by service upon appellant as its business manager and agent. Through the presence of its agent here it was subject to the jurisdiction of the Illinois courts, so far as suits,

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Syllabus.

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or proceedings for contempt, against it are concerned. A corporation can only be punished for contempt through its officers, or those acting in aid of it. (*The First Cong. Church, etc. v. The City of Muscatine*, 2 Iowa, 69; Rapalje on Contempts, secs. 1 and 48.) We think that it was sufficient, under the circumstances of this case, to compel the appellant as manager of the Company, to answer to the contempt proceeding, without making the Company itself, *eo nomine*, a party to such proceeding, because it is admitted by the appellant upon the face of this record, that he caused the attachment suit to be instituted, that it has since been prosecuted under his order and direction, that it has always been in his power, since said suit was begun, to dismiss it, and that it has always been in his power, *as the manager of said company*, to cause such suit to be dismissed.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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28	566
60a	617
198	566
88	144
28	566
00a	278
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28	566
08a	76

HENRY H. GAGE

v.

WILLIAM C. GOUDY.

*Filed at Ottawa May 16, 1889.*

**APPEAL—what questions to be considered—absence of objections or exceptions.** The record in an action of ejectment, which was tried by the court alone, showed no exception to the judgment complained of, and the bill of exceptions mentioned no motion for a new trial, and was silent as to objections or exceptions to the finding of the trial court. The errors assigned in the record were, that the court erred in its finding of facts and entering the judgment, etc.: *Held*, that on this state of the record the errors assigned raised no question this court could consider.

**WRIT OF ERROR** to the Superior Court of Cook county; the Hon. SIDNEY SMITH, Judge, presiding.

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Opinion of the Court.

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Mr. AUGUSTUS N. GAGE, for the plaintiff in error.

Mr. W. C. GOUDY, *pro se.*

Mr. JUSTICE WILKIN delivered the opinion of the Court:

This was an action of ejectment, by defendant in error, against plaintiff in error, to recover certain city lots in Chicago. The trial was before the court, a jury being waived by agreement of the parties, and judgment rendered for defendant in error.

The only errors assigned in this court are, first, the Superior Court erred in entering judgment against plaintiff in error, in substance, manner and form as aforesaid; second, the Superior Court erred in finding plaintiff in error guilty, in substance, manner and form as aforesaid; third, the Superior Court erred in not entering judgment that plaintiff in error go thence without day; fourth, the Superior Court erred in not finding the issues with plaintiff in error, and in not entering judgment accordingly; fifth, the Superior Court erred in its finding of facts; and sixth, the Superior Court erred in its conclusions of law.

This record shows no exceptions to the judgment complained of. The bill of exceptions mentions no motion for a new trial, and is silent as to objections or exceptions to the finding of the trial court and the judgment rendered. In this state of the record the errors assigned raise no question which we can consider. *Martin v. Foulke*, 114 Ill. 206; *Magill et al. v. Brown et al.* 98 id. 235; *Gould v. Howe*, 127 id. 251, and cases there cited.

The judgment of the Superior Court must be affirmed.

*Judgment affirmed.*

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Syllabus.

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BERNARD A. ECKHART *et al.*

v.

AGNES F. IRONS *et al.*

*Filed at Ottawa April 3, 1889.*

128	568
145	342
129	568
156	348
128	568
128	568
160	172
161	449

1. **DEDICATION—of the essential elements.** An intention to dedicate land must be clearly and unequivocally manifested by the owner, and there must be an acceptance of the dedication.

2. **SAME—extent of ground dedicated—dotted lines on plat, as limiting dedication.** A plat of lots in a block showed a dotted line across the north end of the lots, twenty feet south of the street on which the lots fronted, with the words along such dotted line, "line of front of building twenty feet from the street." The lines indicating the east and west boundaries of the lots did not stop at such dotted line, but extended to the street: *Held*, that such dotted line did not show an intention to dedicate the twenty feet off the north end of the lots, but on the contrary, the words along such line clearly negatived any such intent. Such line is but a designation on the plat of the front line of the buildings to be erected thereon.

3. **TOWN PLAT—figures on plat—whether indicating the width and length of the lots.** A certificate of the acknowledgment of the plat of an addition showed that the figures in black ink near the center of the lots indicated the number of such lots. There were other figures along the ends and sides of the lots, but nothing, either on the face of the plat or in the certificates thereto attached, to show what they meant: *Held*, that such last named figures were meaningless, and could not be taken as indicating the width and length of the lots; but if such figures appeared to represent distances, they would have to give way to the actually established metes and bounds of the lots.

4. **CONVEYANCES—limitation as to use of parts of the lots conveyed—a deed construed.** The plat of an addition to a town showed a dotted line across the north end of the lots, twenty feet south of their northern termini, marked "line of front of buildings." The deeds of the proprietor granted the lots by their numbers upon the plat. After the granting clause were the words, "together with the exclusive use of the court-yard between said lots and the street," thereby referring to the twenty-foot strip off the north end of the lots, "upon condition that such yard shall only be used as a front-door yard, and that said party of the second part shall put no building upon said yard except front-door steps, nor erect any fence of unusual height, which shall obstruct the view of the neighborhood." *Held*, that such restriction in the use

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Syllabus.

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of the north twenty feet was intended for the benefit of the other lots fronting on the same street, and to the extent of such restriction it created an implied equitable servitude of each lot in favor of the other lots.

5. In such case, each purchaser taking such a deed took the estate burdened with a like servitude in favor of all the lots, and an equitable easement attached to each and every lot so conveyed, so that the equitable rights and burdens of each lot were mutual and reciprocal, and each lot owner was subjected to the equitable burden, and entitled to the enjoyment of the easement.

6. Such clause in a deed for a lot did not have the effect of limiting the grant to the dotted line, as the grant was of the whole lot as platted. The clause, "together with the use of the court-yard between said lot and the street," must be construed with the plat, and what precedes and follows in the deed.

7. The deeds, after such words of limitation as to the use of the court-yard, further recited: "It being the intention of the party of the first part, in reserving said court-yard, to benefit and improve the neighborhood, said reservation to continue for fifteen years from the date of record of the plat of said subdivision; after the expiration of said term, the fee of said court-yard shall vest in said party of the second part, his heirs and assigns, without any further conveyance." There was no clause for forfeiture for the breach of any condition: *Held*, that the estate was not one upon condition, and that the title vested in the grantee to the whole of the lot, and that the clause was simply a limitation upon the use of the north twenty feet for the period of fifteen years from the recording of the plat.

8. *SAME—exceptions—reservations—the distinction.* The clause in the deed in this case does not create an exception, for the reason that by an exception the grantor withdraws from the effect of the grant some part of the thing itself which would otherwise be included in the grant. Nor can it, strictly speaking, be said to be a reservation, for a reservation must be to the grantor or the one creating the estate, and must be of something arising out of the thing granted, as, an easement, or the like.

9. *SAME—restrictions as to use of property—not favored—but enforceable.* Restrictions on the use of property held in fee are not favored, yet when the intention of the parties is clearly manifested in the creation of restrictions or limitations upon the use of the grantee, for the use of the grantor, his heirs or assigns, a court of equity will enforce the same.

10. *SAME—repugnant provisions—rule of construction.* Where, in construing a deed, there is a clear repugnance between the grant and that limited in the *habendum* or *reddendum*, the latter will be required to yield to the clear words of the grant; but if the words following the

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Brief for the Plaintiffs in Error.

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grant can be so construed that all may stand together, by limiting the estate, without contradicting the grant, that construction must be adopted to give effect to each clause of the deed. Where there is a present grant, any words showing it is to take effect *in futuro* are inconsistent with the grant.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

Messrs. ABBOTT, OLIVER & SHOWALTER, and Messrs. HOLDEN & FARSON, for the plaintiffs in error:

A person can not have an easement in his own land. *Bridge Co. v. Curtis*, 103 Ill. 410.

Where one owns a piece of land, and so arranges it that there would be an easement in one parcel were it the land of another, the easement exists upon the severance of the title. *Morrison v. King*, 62 Ill. 30; *Ingals v. Plamondon*, 75 id. 118.

Platting concludes the original owner, and all claiming under him, and operates by way of estoppel. *Canal Trustees v. Havens*, 11 Ill. 556; *Alword v. Ashley*, 17 id. 363.

When purchasers are induced to believe that lands are dedicated to future lot owners, as, for a landing place, the dedicator can not defeat the same. *City v. Transportation Co.* 12 Ill. 59.

The dedication for the benefit of future lot owners, as, for a landing, (marked "reserved,") may be by plat alone, when it is evident what the dedication is for. *Godfrey v. City*, 12 Ill. 35.

The foundation of the doctrine of easements is a disposition and severance. *Morrison v. King*, 62 Ill. 30; *Ingals v. Plamondon*, 75 id. 118.

The conveyance of a lot by plat conveys no title beyond the limits of the lot, yet an easement appurtenant to the lot would pass. *Gebhardt v. Reeves*, 75 Ill. 301; *Smith v. Heath*, 102 id. 130.

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Brief for the Defendants in Error.

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The deed did not create an easement, and could not convey it. The easement in the land in front of lots 17 and 18 could not be conveyed by a deed conveying those lots, because the easement was appurtenant to other lots.

An easement appurtenant can only pass by a deed conveying the lands to which it is appurtenant. *Railroad Co. v. Koelle*, 104 Ill. 455; *Koelle v. Knecht*, 99 id. 396; *Garrison v. Rudd*, 19 id. 564; *Fitch v. Johnson*, 104 id. 121.

The easement appurtenant to lot 5, block 9, for light, air, prospect and view, over the court-yard in front of lots 17 and 18, would not pass by a conveyance of lots 17 and 18, or by a conveyance of the court-yard itself. How, then, can it be said that any one of the deeds is material? *Hadden v. Shoutz*, 15 Ill. 584; *Garrison v. Rudd*, 19 id. 564.

Mr. H. F. WHITE, for the defendants in error:

A dedication is the act of devoting or giving some property to some proper object in such manner as to conclude the owner. 2 Smith's Lead. Cas. 180; *Hunter v. Trustees*, 6 Hill, 407.

At common law a negative easement of this character can only be acquired by grant, commonly by deed, or by prescription, which presupposes a grant. In this State it can not be acquired by prescription. *Guest v. Reynolds*, 68 Ill. 478.

In order that there shall be a grant or deed, there must be a grantee. Lafin was only a party to the plat, and there was no grantee or private easement claimed by the plat. *Railroad Co. v. Railway Co.* 85 Ill. 212.

A mere license to use property, although houses are built about it, as a street, is not a dedication. Washburn on Easements, (3d ed.) \*151; *Morse v. Stoker*, 1 Allen, 150.

An intention to dedicate may be shown by writing, by declaration or by acts, and it must be unequivocal. *Gentleman v. Soule*, 32 Ill. 279; Washburn on Easements, (3d ed.) \*133; *Rees v. City*, 38 Ill. 322.

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Brief for the Defendants in Error.

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It is purely a question of intention, which a deed shows. *Godfrey v. City of Alton*, 12 Ill. 29; *City of Alton v. Transportation Co.* id. 55; *Marcy v. Taylor*, 19 id. 634; *Waugh v. Leech*, 28 id. 488.

The intention governs. *Harding v. Town of Hale*, 61 Ill. 192; *Rees v. City*, 38 id. 322; *Woodyear v. Hadden*, 5 Taunt. 125; *Insurance Co. v. Littlefield*, 67 id. 368; *Tillman v. People*, 12 Mich. 409; *Holdane v. Trustees*, 23 Barb. 103.

Mere acting so as to lead persons to think that a dedication is made, will not make a dedication, if there be an agreement that explains the transaction. *Marcy v. Taylor*, 19 Ill. 636; *Barraclough v. Johnson*, 8 A. & E. 99.

The intention of the owner must be clear and unambiguous. *McIntyre v. Storey*, 80 Ill. 127; *Chicago v. Johnston*, 98 id. 618; *Kelly v. Chicago*, 48 id. 389; Angell on Highways, secs. 11, 143-151; Smith's Lead. Cas. 182; *Insurance Co. v. Littlefield*, 67 Ill. 368.

Figures on a plat are not sufficient to make out a dedication. *Village of Winnetka v. Prouty*, 107 Ill. 218.

This dedication by the plat is not sufficient, and is no grant. *Railroad Co. v. Railroad Co.* 85 Ill. 211.

The plat conveyed no fee to the public. *Trustees v. Walsh*, 57 Ill. 367.

The dotted line on the plat is not a dedication. Reversion clause construed. Effect of taxing land. *Town of Princeton v. Templeton*, 71 Ill. 68; *Van Valkenburg v. Milwaukee*, 30 Wis. 338.

In platting a village, a square left blank, and no allusion made to it, is no dedication. *Princeville v. Auten*, 77 Ill. 325.

A strip marked "depot" on a plat is not enough, although used for years. *McWilliams v. Morgan*, 61 Ill. 89.

A plat is explained by the deed. Assent thereto by mortgagee, and right to access to street from the lot; doctrine of: *Smith v. Heath*, 102 Ill. 146; *Hague v. Inhabitants of Hoboken*, 23 N. J. 354.

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Opinion of the Court.

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Unless the easement is obvious as to the adjoining owner, it must exist on premises, and be apparent, open and visible, or be of no effect. *Ingals v. Plamondon*, 75 Ill. 118; *Butterworth v. Crawford*, 40 N. Y. 349.

This reservation of a court-yard was limited by the deed to fifteen years. But there must be a permanent or perpetual restraint upon the use and mode of occupation, to constitute an easement. *Washburn on Easements*, (3d ed.) 100; *Gilbert v. Peteler*, 38 Barb. 488.

In the construction of the deed from Lafin to Prescott, the intention must control, and effect given thereto. *City of Peoria v. Darst*, 100 Ill. 609; *Piper v. Connelly*, 108 id. 646; *Wimberly v. Hurst*, 33 id. 166; *Manufacturing Co. v. Wagon Co.* 91 id. 230; *Mortgage Co. v. Gross*, 93 id. 483.

The intention of the parties must be gathered from the entire deed. A recital may qualify general words. *Railroad Co. v. Koelle*, 104 Ill. 457; *Allen v. Holton*, 20 Pick. 463.

The words "upon condition," in a deed, may be construed as a restriction or limitation, when the intention requires. *Fuller v. Ames*, 45 Vt. 400.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

On the 14th day of January, 1863, Matthew Lafin, being the owner of blocks 5, 6 and 9, in canal trustees' subdivision of the west half, and the west half of the north-east quarter of section 17, town 39 north, range 14 east, caused the same to be laid out into lots and alleys, and a plat thereof to be made and recorded. The following is a copy of the plat of block 9, in reference to which this controversy arises:

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**Opinion of the Court.**

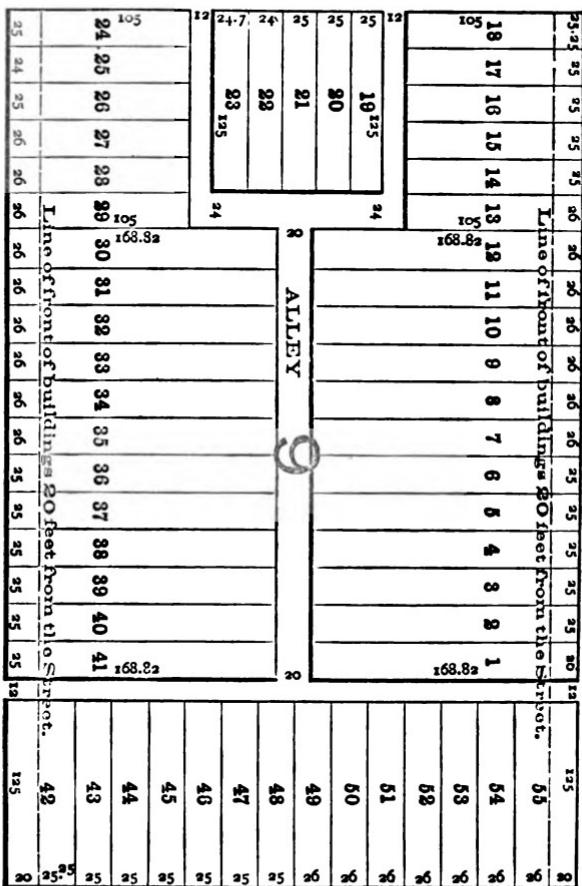
ADAMS

MONROE

ST.

**LAFLIN**

6



**LOOMIS ST.**

There is no reference to the dotted line shown on the plat, and supposed to be twenty feet from Monroe and Adams streets, either in the acknowledgment of the plat, in the surveyor's

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Opinion of the Court.

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certificate, or in any of the subsequent deeds of the lots made by said Laflin. The surveyor certifies that he had surveyed and subdivided the blocks into lots, streets and alleys, and that the annexed plat is a true representation of said survey and subdivision. The certificate of acknowledgment of the plat is, that Laflin, etc., acknowledged that they were proprietors of the blocks, (naming them,) and that the figures in black ink near the center of said blocks (lots) indicate the number of said lots, and that the figures in red ink indicate the value of said lots. There is nothing on the face of the plat, or in the certificate of the surveyor, or of acknowledgment, to indicate what the figures appearing upon the plat were intended to represent, other than as above stated. The numbers in red ink, indicating the price of lots, are omitted, as no question arises in respect thereof. The figures in black ink near the center of the lot, from 1 to 55, inclusive, indicate the number of the lot, showing that block 9 was divided into fifty-five lots. What the other figures upon the plat mean is left to conjecture.

On the 22d day of June, 1863, Laflin and wife, by warranty deed, conveyed to Eli S. Prescott, lots 17, 18, 22, 23, 28, 29, and the east twenty feet of lot 27, in said block No. 9, with all the appurtenances thereto belonging, which deed also contains this clause: "Together with the exclusive use of the court-yard between said lot and the street, upon condition that said yard shall only be used as a front-door yard, and that said party of the second part shall put no building upon said yard, except front-door steps, nor erect any fence of unusual height which shall obstruct the view of the neighborhood, nor create nor allow any nuisance which may be objectionable to the neighbors; and, also, upon condition that said party of the second part shall pay all taxes and assessments which shall be levied upon said court-yard, it being the intention of said party of the first part, in reserving said court-yard, to benefit and improve the neighborhood, said reservation to continue

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Opinion of the Court.

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for fifteen years from the date of record of the plat of said subdivision; and after the expiration of said term, the fee of said court-yard shall vest in said party of the second part, his heirs and assigns, without any further conveyance. But in case the conditions upon which the use of said court-yard is granted to said party of the second part shall be violated, then and in that case the said party or parties of the second part, their heirs, executors, administrators or assigns, shall forfeit and pay to said parties of the first part, their heirs, executors, administrators or assigns, the sum of \$10 per diem for each and every day said nuisance or obstruction shall remain thereon, said penalty recoverable before any justice of the peace or other court of record."

By several *mesne* conveyances, defendant Agnes F. Irons became the owner of lots 17 and 18, in block 9. Under the deed to Prescott, the parties had entered into possession of the lots according to their description, and upon the purchase by Mrs. Irons of said lots 17 and 18, she went into possession thereof, as it appears, to the lines of said lots east and west, as possession had been delivered by Laflin. There is, however, no controversy as to the width of these lots east and west. It also appears that Laflin had made sales of the other lots in that block fronting on Monroe street, and conveyed the same by deeds containing the same provision as in that to Prescott. Most of the lots fronting on Monroe street were subsequently improved by the erection of substantial buildings thereon, on a line twenty feet south of said street. Shortly before the filing of the bill in this case, Mrs. Irons commenced the erection of six brick and stone dwelling-houses on lots 17 and 18, fronting on Laflin street, the north one thereof extending to the line of Monroe street, and being on the twenty feet designated as a court-yard in said deed. The plaintiffs in error, being owners of other lots in said block 9 fronting on Monroe street, filed this bill to compel Mrs. Irons to remove the building on said twenty-foot strip of land, to enjoin the erection

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Opinion of the Court.

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of any building thereon, and to compel her to front her buildings on Monroe street. At the hearing the court refused the relief prayed, and dismissed the bill.

It is insisted that Laflin, by the plat, made a dedication of the twenty-foot strip, either to the public or to the purchasers of other lots fronting on Monroe street. An intention to dedicate land must be clearly and unequivocally manifested by the owner, and there must be an acceptance of the dedication. The dotted line across the north end of the lots can not be said to afford evidence of an intention to dedicate twenty feet off of the north end of the lots, to the public, for a street, or to widen Monroe street at that point. (See *Princeton v. Templeton*, 71 Ill. 68.) Such an intent is clearly negatived by the words written on or along such dotted line, to-wit, "line of front of buildings twenty feet from the street." This is also clearly manifest from the language of the deed. The east and west lines of the lot, it will be observed, extend through to Monroe street, and if the ground north of the dotted line was not intended to constitute a part of the lots, as designated on the plat, such lines would have stopped at the dotted line, or there would have been other indications of the intent that the north boundary of the lot should be the dotted line. Exactly the reverse is true. The dotted line is manifestly not intended as the north line of the lot, which it was intended should be bounded by the south line of Monroe street, but is a designation on the plat of the front line of the buildings to be thereon erected. This becomes very manifest when the words accompanying the dotted line are considered in connection with the reservation in the deed, which will be considered further on. This case differs from that of *Smith v. Heath*, 102 Ill. 130, in that in the center of the plat in that case was shown a square, not intersected by the lines of lots, and designated on such plat as "Aldine square," and most, if not all, of the lots were shown upon the plat to abut or front upon such square.

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Opinion of the Court.

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This plat fails to show an intention to dedicate the north twenty feet of the lots, either to the use of the public or to the use of the purchasers of other lots. It is true that the figures "105," on lots 13 and 18, if intended to indicate feet, do not correctly describe the length of the lot. These lots, from Monroe street to the alley, are one hundred and twenty-five feet deep, and the figures "105" would indicate the number of feet from the alley to the dotted line, or south side of the court-yard. But, as before said, there is nothing to indicate or show what such figures represent, either on the face of the plat or in the certificate, unless we are justified in assuming, from the facts appearing, that they mean the length of the lot in feet. (*City of Belleville v. Stookey*, 23 Ill. 441; *Village of Winnetka v. Prouty*, 107 id. 218; *Town of Lake v. LeBahn*, 120 id. 98.) As we have seen, the plat shows the lots extend from Monroe street to the alley, and the figures "105," if intended to represent feet, if added to the twenty feet between the dotted line and Monroe street, would correctly designate the true length of the lot, as platted. But if the calls, by length of the lines, are found to be incorrect, such calls must give way to the actually established metes and bounds of the lot.

The deed from Laflin to Prescott conveys lots 17 and 18, with others, by the numbers as shown upon this plat. Following the granting clause of the deed occur the words, "together with the exclusive use of the court-yard between said lot and the street." The court-yard here referred to is the twenty-foot strip off the north end of the lot, and the exclusive use of it is given "upon condition that such yard shall only be used as a front-door yard, and that said party of the second part shall put no building upon said yard, except front-door steps, nor erect any fence of unusual height, which shall obstruct the view of the neighborhood." The grant of the lot was subject to this restriction and limitation upon the use and enjoyment of that part thereof designated in the deed as a court-yard. This undoubtedly was intended for the benefit of

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Opinion of the Court.

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the other lots fronting on the same street, and to the extent of such restriction of the use of the court-yard it created an implied equitable servitude of the lot granted, in favor of the other of said lots, and each purchaser taking such a deed, took the estate burdened with a like servitude in favor of all the lots, and an equitable easement attached to each and every lot so conveyed, so that the equitable rights and burdens of each lot were mutual and reciprocal, and each lot owner was subjected to the equitable burden, and entitled to the enjoyment of the easement. The power of the grantor to thus impose limitations and restrictions upon the use and enjoyment of the property granted, as he may deem proper, and of the grantee to accept the same, can not be denied, unless opposed to public policy. Nor do we think that the clause of the deed quoted had the effect of limiting the grant. The grant was of the lots as platted. The clause, "together with the use of the court-yard between said lot and the street," must be construed in connection with the plat, and what precedes and follows in the deed.

It is said that such exclusive use shall be upon "condition that said yard shall only be used as a front-door yard," etc., and the intention of the parties with reference thereto is set out as follows: "It being the intention of said party of the first part, in reserving said court-yard, to benefit and improve the neighborhood, said reservation to continue for fifteen years from the date of record of the plat of said subdivision, and after the expiration of said term the fee of said court-yard shall vest in said party of the second part, his heirs and assigns, without any further conveyance." It will be observed that there is no provision made for a forfeiture upon breach of the condition, and it is clear that the estate was not one upon condition. As before said, we think it clear that the title vested in the grantee to the whole of the lot, and that the clause quoted is simply a limitation upon the use of the north twenty feet, for the period of fifteen years from the date of the

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Opinion of the Court.

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recording of said plat. It is manifest that such limitation upon the use by the grantee, was intended for the benefit of the grantor, and of all persons to whom he had or might thereafter sell such lots. The words, "said reservation to continue for fifteen years," can only relate to the use, or limitation upon the use, of the twenty feet designated in the deed as a court-yard, by the grantee, in the manner provided,—that is, as a front-door yard,—and that he shall not erect or build a high fence, or put any buildings thereon, "which shall obstruct the view of the neighborhood." The intention to create a servitude upon each lot for the benefit of all other lots is clearly manifest. Washburn on Easements, 100, and authorities.

As we have seen, the grant was of the lot, by its number, as designated on the plat, and in construing the deed, any clear repugnance between the grant and that limited in the *habendum* or *reddendum*, the latter will be required to yield to the clear words of the grant; but if the words following the grant can be so construed that all may stand together, by limiting the estate without contradicting the grant, that construction must be adopted, in order to give effect to each clause of the deed. This may be done in this case. It is expressly provided, that after the expiration of fifteen years the fee of said court-yard shall vest in the party of the second part, his heirs and assigns, without any further conveyance. That deed was therefore to be operative as a conveyance of title in fee. If the contention of plaintiffs in error is to obtain, it would be to make the deed effective *in futuro*, as respects the so-called court-yard. This is manifestly inconsistent with the grant, and with the evident intention of the parties. All may be rendered consistent if the clause under consideration, in its entirety, be construed as a limitation upon the use of the property for the period limited; and this accords with the expressed intent of the parties, as clearly manifested by the language employed.

Strictly speaking, it can not be said that the clause of the deed referred to is an exception, for the reason that by an ex-

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Opinion of the Court.

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ception in a deed, the grantor withdraws from the effect of the grant some part of the thing itself which would otherwise be included in the grant. Here no portion of the land is reserved or excepted out of the grant. Nor can it, strictly speaking, be said to be a reservation, for the reservation must be to the grantor or the one creating the estate, and must be of something arising out of the thing granted, as, an easement or the like. Washburn on Real Prop. 440.

It is not, however, material that we should determine or define the exact nature of the several equitable rights and duties of the different lot owners, for the reason that they were limited to a term of years, which has expired. It is to be carefully observed that the restriction upon the use by the grantee, of the court-yard is expressly limited. The provision is: "It being the intention of said party of the first part, in reserving said court-yard, to benefit and improve the neighborhood, said reservation to continue fifteen years from the date of the record or plat of said subdivision; and after the expiration of said term, the fee of said court-yard shall vest in said party of the second part, his heirs and assigns, without any further conveyance." The effect of this clause of the deed was, as before stated, to create an equitable easement in Laflin, and the other lot owners to whom he had or might convey; but the "reservation," so-called, operated simply by way of limitation upon the use of the property by the grantees in the several deeds. 3 Washburn on Real Prop. 437; *Noble v. Illinois Central Railroad Co.* 111 Ill. 437; *Fuller v. Ames*, 45 Vt. 400.

Restrictions on the use of property held in fee are not favored, yet where the intent of the parties is clearly manifested in the creation of restrictions or limitations upon the use of the grantee, for the benefit of the grantor, his heirs or assigns, a court of equity will enforce the same; and the cases are numerous where the reservation of an easement, privilege or benefit, out of the granted premises, has been sustained. See

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Opinion of the Court.

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*Sprague v. Snow*, 4 Pick. 54; *Choate v. Burnham*, 7 id. 274; *Dyer v. Sanford*, 9 Metc. 359; *Fuller v. Ames, supra*; 3 Washburn on Real. Prop. 441, *et seq.*

It was manifestly the intention of the parties that at the end of fifteen years from the date of the recording of the plat the grantee should become vested with a fee simple title in the whole of said lot extending to the line of Monroe street, free from any restriction or limitation soever. The complainants and others acquiring title under the deeds from Laflin, acquired the same right, and took with notice that the limitation upon the use of the property by the several grantees in such deed would terminate at the end of that period. Equity, looking beyond the mere form, and into the substance, will give effect to the intent of the parties when it can be found, and in such case will disregard mere technical distinctions. The estate here intended to be granted was the fee, which imports absolute and unconditional ownership. As said by the learned judge who tried this case below: "If there is any doubt whether the restrictions were to cease then, (at the end of fifteen years,) or whether they were to be permanent, the existence of the doubt is to deny the existence of the easement or privilege. All doubts must be resolved in favor of natural rights, and against restrictions thereon."

The decree of the circuit court dismissing the bill was properly entered, and the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE BAILEY, having heard this case in the Appellate Court, took no part in its decision here.

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Syllabus. Opinion of the Court.

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BYRON L. SMITH, Receiver,

v.

GEORGE F. KIMBALL.

*Filed at Ottawa May 16, 1889.*

128	583
68	500
128	583
174	154
128	583
179	14

128	583
198	1478

1. **ASSIGNMENT OF ERROR**—*for what cause—and by whom—as to judgment entered pro forma, by consent.* A party can not complain of an error which he has himself induced the court to make, or has consented to.

2. So where the judgment or decree of the trial court is affirmed by the Appellate Court, *pro forma*, on the motion of the appellant, under a stipulation of the parties that the decree or judgment shall be so affirmed, the appellant, on an appeal to this court, can not assign for error the judgment of the Appellate Court so entered at his request.

3. **APPPELLATE COURT**—*duty to hear and decide cases on the merits.* Where a case is taken to the Appellate Court, it is the duty of that court to hear and decide it on its own judgment, and file a written opinion, briefly giving its reasons for its decision.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. WALKER & EDDY, for the appellant.

Mr. H. W. WOLSELEY, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Bill was filed in the Superior Court of Cook county, praying the appointment of a receiver for the Traders' Bank of Chicago. Upon hearing, the Superior Court decreed that a receiver be appointed, as prayed. An appeal was taken from that decree to the Appellate Court for the First District, and thereupon a stipulation was entered into, in writing, by the solicitors of the respective parties, and filed in the Appellate Court, as follows, omitting the caption: "It is hereby stipulated between the parties interested in the above appeal, that the order appealed

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Opinion of the Court.

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from, which was entered on the 13th day of December, A. D. 1888, in the Superior Court of Cook county, may be affirmed *pro forma* by the Appellate Court for the First district, State of Illinois, and the cause carried direct to the Supreme Court." The Appellate Court thereafter entered an order in the case, as follows, from which this appeal is prosecuted, namely, (omitting the caption): "This day came said parties, by their respective counsel, and, on motion of appellant, it is ordered by the court that the judgment of the Superior Court of Cook county be and the same is hereby affirmed, in all things, *pro forma*, in accordance with the stipulation filed herein." Then follow a judgment for costs and an order allowing an appeal to this court. The several errors assigned are, in effect, that this judgment is erroneous, giving specific reasons.

It is obvious from the foregoing recitals,—first, that the judges of the Appellate Court exercised no judgment upon the questions involved in this case, for the *pro forma* entry was made, not because they thought the merits of the case demanded it, but because they were requested to enter it; and second, that the judgment entered was requested by appellant to be entered precisely as it was entered, and if there was error committed thereby, it was therefore committed by the request of appellant.

When a case is taken to the Appellate Court, it is the duty of that court to hear and decide it, and file a written opinion briefly giving its reasons for its decision. See section 17 of act to establish Appellate Courts, (Laws of 1877, p. 69,) and act amendatory thereof, (Laws of 1885, p. 65, sec. 1.) But a party can not complain of an error which he has himself induced the court to make. And so here, if appellant is adversely affected by an erroneous judgment, it is simply because he consented and requested that it be entered. He can not assign error upon it. *Armstrong et al. v. Cooper*, 11 Ill. 540.

The judgment is affirmed.

*Judgment affirmed.*

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Syllabus.

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## NANCY HARRIS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Filed at Ottawa May 16, 1889.*

1. TRIAL BY JURY—in criminal cases—constitutional guaranty—waiver of jury—whether allowable, so as to confer jurisdiction upon the judge. By the constitution of the State, the common law right to a trial by jury in criminal cases is guaranteed, and declared to be inviolable, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It thus seems that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded.

2. So in a prosecution for a felony, when the plea of not guilty is entered, the right to a jury trial can not be waived by the accused, so as to confer upon the court jurisdiction to try, convict and sentence the defendant without the intervention of a jury.

3. It is true, a defendant in a criminal case may waive a trial by jury by plea of guilty. But while he may waive a trial by jury, he can not, by such waiver, confer jurisdiction to try him by a tribunal which has no such jurisdiction by law.

4. A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury he has, by law, no jurisdiction. If he attempts to sit as a substitute for a jury, and perform their functions in such cases, his act must be regarded as nugatory.

5. COURT—for trial of criminal cases—of what officers it must consist. The Criminal Court of Cook county, and the circuit courts, when properly constituted for the trial of criminal cases, and especially for the trial of felonies, consist not merely of a judge, but also of a clerk, a sheriff, a State's attorney and a jury. The judicial functions brought into exercise in such trials are parceled out between the judge and the jury, and so long as there is no law authorizing it, the functions to be exercised by the jury might just as well be transferred, by agreement of the parties, to the clerk or sheriff, as to the judge.

6. JURISDICTION—by consent. It is a maxim in the law, that consent can never confer jurisdiction; by which is meant that the consent of the parties can not empower a court to act upon subjects which are not

128	585
136	162
128	585
146	281
128	585
107	456
128	585
188	147
183	153
128	585
188	152
128	585
195	514
195	516
195	519
128	585
202	299
128	585
dl18a	1474

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Brief for the Plaintiff in Error.

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submitted to its determination and judgment by the law. The law creates courts, and, upon considerations of public policy, defines and limits their jurisdiction, and this can neither be enlarged nor restricted by the act of the parties.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. S. B. MINSHALL, and Mr. JAMES WHITTAKER, for the plaintiff in error:

In trials for felony, the defendant can not waive the constitutional right to a jury trial, and after such waiver and trial by the court, the finding is a nullity. Const. art. 2, secs. 2, 5, 9; Rev. Stat. chap. 38, secs. 4, 11, 15; Bishop on Crim. Proc. (3d ed.) sec. 894; Cooley's Const. Lim. 319; Proffatt on Jury Trial, sec. 113; *State v. Lockwood*, 43 Wis. 405; *State v. Mansfield*, 41 Mo. 471; *Neals v. State*, 10 id. 500; *Cancemi v. People*, 18 N. Y. 131; *Work v. People*, 2 Ohio St. 304; *Hill v. People*, 16 Mich. 356; *Commonwealth v. Shaw*, 1 Pittsb. 492; *Brown v. State*, 8 Blackf. 561.

It was not in the power of the legislature to provide, by statute, that a petit jury should consist of less than twelve men, nor that less than the whole twelve could return a verdict. 41 N. H. 550.

"No person shall be deprived of life, liberty or property without due process of law." Const. art. 2, sec. 2.

"In all criminal prosecutions, the accused shall have the right to \* \* \* a speedy and public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Const. art. 2, sec. 9.

"The right of trial by jury, as heretofore enjoyed, shall remain inviolate." Const. art. 2, sec. 5; *Commonwealth v. Shaw*, 1 Pittsb. 494.

"All trials for criminal offenses shall be conducted according to the course of the common law, except when this act points out a different mode." Rev. Stat. chap. 38, par. 488, sec. 8.

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Brief for the People.

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"Juries, in all criminal cases, shall be the judges of the law and the fact." Rev. Stat. chap. 88, par. 491, sec. 11.

"In cases where the party pleads 'guilty,' such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea, after which, if the party persists in pleading 'guilty,' such plea shall be received and recorded, and the court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury. In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense." Rev. Stat. chap. 38, par. 484, sec. 4.

The right of trial by jury is secured by the constitution upon a principle of public policy, and can not be waived. Cooley's Const. Lim. 319, 410, note; Proffatt on Jury Trial, sec. 113.

Mr. GEORGE HUNT, Attorney General, for the People:

We contend that the court had jurisdiction to hear and determine the case without a jury.

Circuit courts have original jurisdiction of all causes in law and equity. Const. 1870, art. 6, sec. 12.

The jury is not part of the court, except in cases where it is made so by statute. Section 6, division 14, of the Criminal Code, declares: "In all cases where the punishment shall be confinement in the penitentiary, if the case is tried by a jury, the jury shall say, in their verdict, for what time the defendant shall be confined," etc. This clearly implies that the case may be tried by the court, and not by a jury. In such case, the punishment must be determined by the court.

Section 9 of the same division declares: "When the accused pleads guilty, and in all other cases not otherwise provided for, the court shall fix the time of confinement, or the amount of the fine, or both, as the case may require."

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Brief for the People.

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The clause, "all other cases not otherwise provided for," refers to cases other than those in which the accused pleads guilty, and includes just such a case as this. The law here authorizes the court to fix the penalty—makes it a legal tribunal to fix the punishment. In the case at bar, the punishment was fixed by that legal tribunal, and not by an unauthorized tribunal created by the agreement of parties, as in the cases referred to in the brief of counsel for plaintiff in error.

The sections of the constitution referred to by counsel for plaintiff in error guarantee rights. They do not purport to, nor do they, deprive a person of rights. Saying, "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," does not mean that a person can not waive that right. It does not mean that it shall be a burden placed upon him which he can not free himself from, but rather a privilege which may be enjoyed by him, and of which he shall not be deprived against his will.

The words, "shall remain inviolate," mean that he shall not be deprived of his privilege by other persons, or by State authority. They do not mean that he may not waive the privilege. When a person is accused, he is to have the right of a trial by jury as heretofore enjoyed,—that is, the jury shall be selected from disinterested and unprejudiced citizens. It shall consist of twelve members. No law shall deprive a person accused of crime, of the right to a trial by such a jury, but there is no implication that the accused may not waive that right for himself.

That the right to a trial by a jury of twelve lawful men may be waived, see *Brown v. State*, 8 Blackf. 561; *Daily v. State*, 40 Ohio St. 57; *Hill v. People*, 16 Mich. 356; *Dillingham v. People*, 50 Pa. St. 280; *League v. State*, 36 Md. 257; *People v. Lane*, 55 Barb. 168; *State v. Moody*, 24 Mo. 560; *State v. Larger*, 45 id. 560; *People v. Goodwin*, 5 Wend. 251; *Nomaque v. People*, Breese, 145; *Zarresseller v. People*, 17 Ill. 101; *People v. Scates*, 3 Scam. 351; *Darst v. People*, 51 Ill. 286; *Chase v. People*, 40 id. 352; *Perteet v. People*, 70 id. 179.

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Opinion of the Court.

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Mr. JUSTICE BAILEY delivered the opinion of the Court:

Nancy Harris, the defendant, was indicted in the Criminal Court of Cook county, the indictment charging her, in the first count, with the crime of larceny, and in the second count, with receiving and aiding in concealing stolen property, knowing it to be stolen, with the intention of preventing the owner from again possessing the same. In both counts the value of the property stolen was alleged to be a sum exceeding \$15. The defendant being arraigned pleaded not guilty, and thereupon, by agreement between the defendant, her counsel and the state's attorney, a jury was waived, and the defendant was tried by the court without a jury. At such trial the court found her guilty as charged in the indictment, and sentenced her to imprisonment in the penitentiary for the term of one year. She now brings the record to this court and alleges that her conviction is illegal, for the reason that the Criminal Court had no power or authority to try her without a jury.

The question thus presented is, whether, in a prosecution for a felony, where a plea of not guilty is entered, the right to a jury trial can be waived, so as to confer upon the court the jurisdiction to try, convict and sentence the defendant without the intervention of a jury. It must be admitted that, if the power to try an indictment for a felony without a jury exists, such power is not given by the express terms of either the Constitution or statutes. Article 2 of the Constitution, known as the Bill of Rights, contains the following:

Sec. 2. "No person shall be deprived of life, liberty or property, without due process of law.

Sec. 5. "The right of trial by jury as heretofore enjoyed shall remain inviolate.

Sec. 9. "In all criminal prosecutions, the accused shall have a right to \* \* \* a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

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Opinion of the Court.

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Division 13 of the Criminal Code contains the following provisions:

Sec. 8. "All trials for criminal offenses shall be conducted according to the course of the common law, except when this act points out a different mode, etc."

Sec. 11. "Juries in all criminal cases shall be the judges of the law and of the fact."

There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty, was a jury of twelve men. 4 Black. Com. 349; 1 Chitty's Crim. Law, 505; 2 Hale's Pleas of the Crown, 161; Bacon's Abridg. tit. Juries, A.; 2 Bennett & Heard's Lead. Cas. 327. This right of trial by jury in all capital cases—and at common law a century and a half ago all felonies were capital—was justly regarded as the great safe-guard of personal liberty. Says Mr. Blackstone: "The founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion." 4 Black. Com. 349. The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court.

Not only have we, in general terms, adopted the common law as a system, but by the express provisions of our Constitution and statutes the mode of trial in criminal cases known to that system is specifically adopted and preserved. By the clauses of the Constitution above cited, the common law right

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Opinion of the Court.

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to a trial by jury in criminal cases is guaranteed and declared to be inviolable, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded.

A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory. Especially must this be true where the jury are not only the judges of the facts as at common law, but are also the judges of the law as provided by our statute.

But it is said that the right to a trial by a jury is a right which the defendant may waive. This may be admitted, since every plea of guilty is, in legal effect, a waiver of the right to a trial by the legally constituted tribunal. But while a defendant may waive his right to a jury trial, he can not by such waiver confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law. Jurisdiction of the subject matter must always be derived from the law and not from the consent of the parties, but in the present case, jurisdiction is sought to be based, not upon any law conferring it, but upon the defendant's consent and agreement to waive a jury and submit her cause to the court for trial. "It is a maxim in the law that consent can never confer jurisdiction; by which is meant that the consent of the parties can not empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits

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Opinion of the Court.

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their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties." Cooley's Const. Lim. 398.

It is said, however, that the Constitution and statutes confer upon the Criminal Court of Cook county general jurisdiction of all criminal cases arising in Cook county. That is true, but the court, when properly constituted for the trial of criminal cases, and especially for the trial of felonies, consists not merely of a judge, but also of a clerk, a sheriff, a state's attorney and a jury. For the trial of felonies the judge alone is not the court. The judicial functions brought into exercise in such trials are parceled out between him and the jury, and so long as there is no law authorizing it, the functions to be exercised by the jury might just as well be transferred, by agreement of the parties, to the clerk or sheriff as to the judge.

The views we have expressed are fully supported by the authorities. Thus, in *State v. Lockwood*, 43 Wis. 403, a defendant to a criminal information waived a jury and submitted his cause to the court for trial, and was tried by the court and convicted. On appeal to the Supreme Court it was held that the proceeding was a mis-trial, and that there had been no conviction within the meaning of the statute. In the opinion the court say: "A plea of not guilty to an information or indictment for crime, whether felony or misdemeanor, puts the accused upon the country, and can be tried by a jury only. The rule is universal as to felonies; not quite so as to misdemeanors. But the current of authority appears to apply it to both classes of crime; and this court holds that to be safer and better alike in principle and practice. The right of trial by jury, upon information or indictment for crime, is secured by the Constitution, and upon a principle of public policy, and it can not be waived." In *Williams et al. v. State*, 12 Ohio St. 622, the defendants were indicted for a felony, and having entered a plea of not guilty, they waived a jury and consented to a trial by the court, and were tried and convicted. The conviction was reversed on writ of error, the Supreme Court

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Opinion of the Court.

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holding that it was not in the power of the accused to waive a trial by jury and by consent submit to have the facts found by the court, so as to authorize a legal judgment and sentence upon such finding.

The question has most frequently arisen where a defendant to a criminal prosecution has waived a trial by a full panel, and has consented to be tried by a smaller number of jurors. In all the States where the question has arisen in that form, with a very few exceptions, it has been held that a defendant has no power to waive a trial by a full panel of twelve men, the reasoning upon which such decisions are based being equally applicable to cases where an attempt is made to dispense with a jury altogether. The doctrine of the decisions of that class is summed up by Judge Cooley as follows: "A petit jury is a body of twelve men, who are sworn to try the facts of a case, as they are presented in the evidence placed before them. Any less than this number of twelve would not be a common law jury, and not such a jury as the Constitution guarantees to accused parties, when a less number is not allowed in express terms; and the necessity of a full panel could not be waived—at least in case of felony—even by consent. The infirmity in the case of a trial by a jury of less than twelve, by consent, would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would in effect be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offense against the State." Cooley's Const. Lim. 319.

In *Cancemi v. The People*, 18 N. Y. 128, the court, while conceding that the defendant in a criminal case may, by consent, affect the conduct of the case in various particulars, lays down the rule that "the substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties;" and, "when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any

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Opinion of the Court.:

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essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant." Among the numerous other cases where a similar doctrine has been laid down, the following may be cited: *Work v. The State*, 2 Ohio St. 297; *State v. Mansfield*, 41 Mo. 470; *State v. Daris*, 66 id. 684; *Neals v. State*, 10 id. 499; *Brown v. State*, 8 Blackf. 561; *Allen v. State*, 54 Ind. 461; *Commonwealth v. Shaw*, 1 Pittsburg, 492; *Hill v. People*, 16 Mich. 351.

In the trial of Lord Dacres for treason in the reign of Henry VIII, the question was presented whether the prisoner might waive a trial by his peers and be tried by the country, and all the judges of the King's Bench agreed that he could not, for the statute of Magna Charta was in the negative and the prosecution was at the instance of the King. The same was again resolved on the arraignment of Lord Dudley in the seventh year of the reign of Charles I, and the reason assigned was, that the mode of trial was not so properly a privilege of the nobility, as a part of the indispensable law of the land, like the trial of commoners by commoners, enacted or rather declared by Magna Charta. 2 Wooddesson's Lectures, 346. See also 3 Inst. 30.

In *People v. Lyons et al.* 16 Chicago Legal News, 320, the late Judge McAllister, in a case brought before him on *habeas corpus*, where the defendants had been tried and convicted of a felony by the court, a jury having been waived by their consent, delivered an able and satisfactory opinion holding that the conviction was void, and that the defendants were illegally imprisoned thereunder.

We are of the opinion then, both upon principle and authority, that the Criminal Court had no legal power to try the defendant without a jury, notwithstanding her consent and agreement in that behalf, and that the trial and conviction are therefore erroneous. The judgment will be reversed and the cause remanded.

*Judgment reversed.*

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Syllabus.

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SAMUEL FIELDEN *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa May 16, 1889.

128	595
144	608
128	595
403	243
128	595
190	87

1. **AMENDMENT OF RECORD—*at a subsequent term.*** Amendments of the record in affirmance of a judgment, when there is anything by which to amend, may, upon proper notice, be made at a term subsequent to that at which final judgment was rendered; but amendments not in affirmance, but in derogation of the judgment, are not allowed at a term subsequent to that at which final judgment is rendered.

2. The record of this court affirming a judgment of conviction in a capital case, showed the presence of the prisoners in court on the rendition of the judgment of affirmance. At a subsequent term, the prisoners, by their counsel, entered a motion in this court to amend the record so as to omit the recital of the presence of the prisoners in court, which motion was overruled, as was also a motion for leave to amend the original motion, on the ground the proposed amendment was in derogation of the judgment, and came too late. But the court do not concede that the amendment, if made, could affect the validity of the judgment.

3. **CRIMINAL LAW—presence of prisoner in court—in the trial court, and in the Supreme Court.** The common law required, when any corporal punishment was to be inflicted on the defendant, that he should be personally present before the court at the time of pronouncing the sentence. The reasons for this were, that the defendant might be identified by the court as the real party adjudged guilty; that he might have a pardon to plead, or move in arrest of judgment; that he might have an opportunity to say why judgment should not be rendered; and that the example of being brought up for the animadversion of the court and the open denunciation of punishment, might tend to deter others from like offenses. None of these reasons can apply to the judgments of affirmance by this court in criminal cases.

4. On writ of error to reverse a judgment in a capital case, the personal attendance of the defendant on the argument or at the decision of the court is not necessary to give such court jurisdiction. Such attendance is not required by the practice of this court or by any statute, but on the contrary, the statutes on the subject contemplate that such defendant will not be present in this court at any time.

5. The provisions of section 9, article 2, of the State constitution, that "in all criminal prosecutions the accused shall have the right to

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Statement of the case.

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appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial," etc., have no application to writs of error by which the accused seeks to have a judgment against him reversed. Such a proceeding is not a criminal prosecution.

6. *SAME—fixing date of execution by the Supreme Court—a ministerial act.* The naming of the day by the Supreme Court, on judgment of affirmance, when the judgment of conviction is to be executed, is but the exercise of a ministerial power, which, at the common law, was sometimes exercised by the sheriff. In this State the power may be exercised by the Governor in case of a temporary reprieve.

7. *BILLS OF EXCEPTIONS—in what courts allowable.* At common law, a bill of exceptions could not be taken in case of a felony, and it is, by our statute, only authorized to be taken on trial at *nisi prius*; and there is no authority, common law or statutory, authorizing the Supreme Court, or any member of it, to sign a bill of exceptions.

#### WRIT OF ERROR to the Criminal Court of Cook county.

At the March term, 1888, of this court, motion was made to this court, in the words following:

"And now comes the plaintiff in error Samuel Fielden, and the plaintiff in error Michael Schwab, and the plaintiff in error Oscar W. Neebe, and each for himself says, that in a certain entry upon the records in the above entitled cause, purporting to have been entered on the 14th day of September, A. D. 1887, there is error, and the said entry on said record in said cause is false and untrue, the recital in said record being as follows:

"On this day came again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record or proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that that record is no error: Therefore it is considered by the court, that the judgment aforesaid be affirmed in all things, as to each and every of

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Statement of the case.

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said plaintiffs in error, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further ordered by the court, that the 11th day of November, A. D. 1887, be and the same is fixed as the time when the sentence of death pronounced upon said plaintiffs in error, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel and Louis Lingg, by the Criminal Court of Cook county, Illinois, shall be executed. And it is further ordered by the court, that the sheriff of Cook county, Illinois, be and he is hereby ordered and directed to carry into execution the sentence by the Criminal Court of Cook county, Illinois, of the defendants in the indictment, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel and Louis Lingg, on Friday, the 11th day of November next, (November 11, A. D. 1887,) between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of that day. And it is further considered by the court, that the said defendants in error recover of and from the said plaintiffs in error their costs by them in this behalf expended, and that they have execution therefor.'

"Whereas, in truth and fact, as each plaintiff in error is ready to verify, he nor any of his co-plaintiffs in error was present in said court at the time of the rendering of the said judgment last above recited, either in person or by his attorneys, or either or any of them, nor were they, the plaintiffs in error, or either or any of them, or their counsel, or either or any of them, notified to be present, either in person or by attorneys,—and this each plaintiff in error is ready to verify; and the recital therein contained, 'On this day came again the said parties,' is wholly false and untrue, wherefore plaintiffs in error and your petitioners, and each of them, pray that the said record may be amended to conform with the truth and the fact, and that it may appear upon the face of the said record that at the time of the rendering of said judgment here-

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Opinion of the Court.

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inbefore recited, neither the plaintiffs in error, or either or any of them, nor their attorneys, or any or either of them, were present in court, nor were they notified to be present. And this your petitioners will pray.

SAMUEL FIELDEN,  
MICHAEL SCHWAB,  
OSCAR W. NEEBE,  
By W. P. BLACK and M. SALOMON,  
*Their Attorneys.*"

The consideration of the motion was continued until the September term, 1888, when it was overruled. At the March term, 1889, the parties, by their attorneys, moved for leave to amend the original motion, which amendment consisted of certain affidavits in support of the fact set forth in the original motion as the ground thereof. This motion was also overruled. And thereafter, at the same term of court, a motion was made by the attorneys of the parties, to rehear the motion; which, also, was then denied. And the parties then, by their attorneys, prayed that they have leave to prepare and tender a bill of exceptions, reciting the several motions so made and the rulings of this court thereon.

Mr. W. P. BLACK, and Mr. M. SALOMON, for the plaintiffs in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The purpose of the proposed amendment of the record, as we learn from the argument of counsel, is to make it appear by the record that these plaintiffs in error have been deprived of an important constitutional right,—that of being present when this court rendered judgment affirming the judgment of the Criminal Court of Cook county,—they contending, that without their presence such judgment could not be pronounced. The effect which it is claimed will result from the proposed amendment, is, therefore, in derogation of the judgment,—as

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Opinion of the Court.

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they contend, to nullify and destroy it. It must, hence, be manifest, that this motion ought to have been made at the term at which that judgment was rendered, for, not having been made then, it can avail nothing as to Spies, Parsons, Lingg, Engel and Fischer, and but for executive clemency, under which, and not any judgment of court, Fielden and Schwab are now in the penitentiary, they could not cause the motion to be made.

Under our practice, amendments of the record in affirmance of the judgment, when there is anything to amend by, may, upon notice, be made at a term subsequent to that at which final judgment is rendered; but amendments not in affirmance, but in derogation, of the judgment, are not allowed at a term subsequent to that at which final judgment is rendered. *Planing Mill Co. v. Merchants' Nat. Bank*, 97 Ill. 294. See, also, Powell on Appellate Proceedings, appendix, p. 387, note 1. The amendment in *Phillips v. The People*, 88 Ill. 161, was made before final judgment, and that in *May v. The People*, 92 Ill. 346, was also before final judgment, and it was, moreover, in affirmance of the judgment. The other cases cited by counsel are less pertinent, and therefore demand no comment.

This motion not having been made at the same term at which final judgment was rendered, nor until the case had passed beyond the power of this court to stay, by its order, the execution of the judgment, clearly comes too late.

But it must not be understood that we concede that the amendment, if made, could have affected the validity of the judgment. In our opinion, the amendment, if made, would be inconsequential, and would not affect, in the slightest degree, the rights of the parties under the judgment. The common law required, when any corporal punishment was to be inflicted on the defendant, that he should be personally present before the court at the time of pronouncing the sentence. 1 Chitty's Crim. Law, (5th Am. ed.) 693, \*696. Reasons given

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Opinion of the Court.

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for this are, that the defendant may be identified by the court as the real party adjudged to be punished, (*Holt*, 399); that the defendant may have a chance to plead a pardon, (3 *More*, 265); that he may have a pardon to plead or move in arrest of judgment, (*King v. Speke*, 3 *Salk.* 358); that he may have an opportunity to say what he can say why judgment should be not given against him, (2 *Hale's Pleas of the Crown*, 401, 402); and that the example of the defendants, who have been guilty of misdemeanors of a gross and public kind, being brought up for the animadversion of the court and the open denunciation of punishment, may tend to deter others from the commission of similar offenses. 1 *Chitty's Crim. Law*, (5th ed.) 693, \*696. It is manifest that none of these can apply to this court, because, first, it acts and decides only upon the record made in the court below. It can therefore have nothing to do with the question of the identity of the party whom the sheriff shall have in his custody for punishment. Nor can it entertain a motion in arrest, or a plea of pardon. And since its opinion is prepared and written out and filed with the clerk without being read from the bench, there is, when judgment of affirmance is given, no animadversion and open denunciation of punishment which could benefit bystanders. If the present plaintiffs in error and their counsel had been actually present in court when the judgment of affirmance, here, was entered, the law allowed them to then say or do nothing which, by any possibility, could have benefited plaintiffs in error. They were, after judgment was entered, entitled only to move for a rehearing,—and this could only be done on printed petition; but thirty days were allowed in which to prepare it. (93 Ill. 11, rule 43.) Undoubtedly, if plaintiffs in error or their counsel had been actually present in court when the decision was announced, they would then have known what the decision was; but that fact was equally well made known to them by notice from the clerk,—in ample time to avail of their right to file a petition for rehearing. And if, indeed, without any

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Opinion of the Court.

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fault of theirs, more time would have been needed within which to prepare the petition for rehearing, it was within the recognized practice of this court to have extended the time for that purpose beyond the thirty days. But no claim is here made that plaintiffs in error were not informed of the decision in the case in time to file a petition for rehearing. They did not seek to avail of that right, but voluntarily waived it, and prosecuted a writ of error upon the record from the Supreme Court of the United States, and it was not until after that was decided adversely to them, that they discovered the claimed error in the record of which amendment is now sought.

In *The People v. Clark*, 1 Park. Crim. R. 360, the Supreme Court of New York, at general term, held, that on a writ of error brought to reverse a judgment in a capital case, the personal attendance of the defendant on the argument or at the decision in the appellate court is not necessary to give such court jurisdiction. And there was like ruling in *Donnelly v. The State*, 2 Dutch. 463. See, also, in principle, to like effect, *Bales v. The State*, 18 Mo. 318, and *Commonwealth v. Costello*, 121 Mass. 371.

We may add, moreover, it has not been the practice of this court, from its organization to the present time, to have the plaintiff in error in a criminal case actually present in court at the hearing and when final judgment is given; and it is clear, from the different provisions of the statute, that it not only does not provide for their presence, but it contemplates that they will not be present. Thus, under division 15 of our Criminal Code (Rev. Stat. 1874, p. 415,) it is provided, in section 6: "When the court or judge is of opinion that the party obtaining such writ ought to be bailed until the determination of the writ, and he is at the time in custody, the said court or judge may make an order to admit such prisoner to bail, upon his entering into a recognizance, \* \* \* conditioned that the prisoner will appear"—not in this court, as would be required were his presence here indispensable, but—"at the next

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Opinion of the Court.

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term of court in which his trial took place, and each subsequent term of said court, on the first days thereof, until the determination of such writ of error." In section 7 it is provided: "If the prisoner is in custody of the sheriff, he shall take the recognizance; if in custody of the warden of the penitentiary, he shall take the recognizance. In either case, the recognizance shall be returned to the next term of the court in which the prisoner was sentenced." And it is provided in section 11: "In case of the reversal of any judgment upon which any person has been committed to the penitentiary, and the granting of a new trial by the Supreme Court, it shall be the duty of the warden of the penitentiary, upon receiving a certified copy of such judgment of the Supreme Court, to deliver the person so committed, to the sheriff of the county where such new trial is to be had," etc. If such person were in court at the time the judgment is pronounced, and in custody, he would necessarily be in the custody of the sheriff of the county where this court is then being held; and the statute, instead of providing as thus quoted, would then have provided that the prisoner be delivered by the sheriff having him in custody, to the sheriff of the county where such new trial is to be had.

We are not unmindful that it is guaranteed by section 9 of article 2 of the constitution of this State, that "in all criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel." But it is clear, from the connection of the clause, that this has reference to trials at *nisi prius*, only. The entire paragraph reads thus: "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county,"—all of which rights these plaintiffs in error have fully enjoyed on the trial

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Syllabus.

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in the Criminal Court resulting in their conviction. But they are not now defending against a prosecution. They are, themselves, prosecuting a suit to reverse the judgment by which they were convicted, and it is therefore impossible that these provisions can have any application to it. *Tooke v. The State*, Texas Ct. of App.

The mere naming of the day on which the sentence was to be executed was but the exercise of a ministerial power, which, at common law, was sometimes exercised by the sheriff, (1 Chitty's Crim. Law, 5th Am. ed. p. 782, \*783,) and is in this State exercised by the Governor in case of a temporary reprieve.

At common law, a bill of exceptions could not be taken in case of a felony, (1 Chitty's Crim. Law, 5th Am. ed. p. 622, \*623,) and it is by our statute only authorized to be taken on trials at *nisi prius*. There is, in our opinion, no authority, either common law or statutory, authorizing this court, or any member of it, to sign a bill of exceptions.

The motions are overruled.

*Motions overruled.*

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JOHN B. DRAKE *et al.*

v.

## ISAAC C. OGDEN.

*Filed at Ottawa May 16, 1889.*

1. TAXATION AND TAX TITLES—*levy of a tax by a village to pay town officers.* An incorporated village has no power to levy a tax for the payment of the salaries of town officers, and if a village does levy such tax it will be illegal, and will render the judgment in which such tax is included, and a tax sale thereunder, void.

2. SAME—*notice of tax sale and time of redemption—its requisites, under the statute.* The statute expressly requires the notice of a tax sale, which may be served or published, to state when the land was purchased, in whose name taxed, the description of the land, for what year taxed or

128	603
138	593
128	608
141	223
128	608
148	630
128	603
155	582
128	603
167	430
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181	390
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200	4880
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206	4592
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110a	7125

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Brief for the Appellants.

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specially assessed, and when the time of redemption will expire; and a notice which omits any one of these requirements will be absolutely void.

3. *SAME—notice—whether it may include more than one tract.* It will not vitiate a notice of the tax purchase and when the redemption will expire, that more than one tract or lot may be included in such notice. The statute being silent on this subject, the purchaser or his assignee may exercise his own judgment on the subject.

4. *SAME—service of notice—upon whom—who is an “occupant.”* The placing of a few stacks of hay by a person on a tract of land actually occupied by another, and inclosing the stacks by boards to protect them from the rains, there being no agreement to pay rent, the owner and occupant, however, consenting to the placing of the stacks on the land, is not sufficient to put the owner of the hay in the actual possession or occupancy of the land or any part thereof, within the meaning of section 216 of chapter 120 of the Revised Statutes, entitled “Revenue,” and a purchaser of the land for taxes is not required to serve a notice of his purchase on such person stacking his hay on the premises.

5. *SAME—tax sale of several tracts—in what order to be made.* The statute requires the collector, on the day specified in the notice for the sale of lands for taxes, to offer for sale, separately and in consecutive order, each tract of land, or town or city lot, on which the taxes, special assessments, interest or costs have not been paid. The collector has no power to disregard this mandate of the statute, and if he does so, a sale can not be sustained.

6. Where the collector, however, in addition to the general list for taxes proper, has special lists in certain towns for delinquent special assessments, he may, in the case of a town where there are two lists, in his discretion, take up either list first and then sell under the other list, and this will not be to disregard the direction of the statute.

7. *SAME—judgment for taxes—how far conclusive.* Section 224 of the Revenue act does not make the judgment against the lands for taxes conclusive as an estoppel that the taxes included therein were legal taxes. It shuts out all objections that might have been urged against the judgment, except in cases of payment, or when the land was not liable to the tax or assessment,—and this embraces illegal taxes.

APPEAL from the Circuit Court of Cook county; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. H. S. McCARTNEY, for the appellants:

Every person in the actual occupancy or possession of the premises was not served with a notice of the sale.

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Brief for the Appellants.

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If any part of the property was occupied, the occupant was entitled to the notice. *Comstock v. Beardsley*, 15 Wend. 348; *Lucas v. McEnera*, 19 Hun, 14.

In *Bush v. Davidson*, 16 Wend. 550, the court decide that a mere tenant at sufferance must be notified. In *Jackson v. Estey*, 7 Wend. 151, it was held that an admission that the occupant has no title would not dispense with a notice. *Ellsworth v. Low*, 62 Iowa, 178, was a case where land was unfenced timber land, and no buildings upon it, but an employe had been cutting underbrush and felling timber. It was held that this was such a beneficial use as the nature of the lands permitted, and that it was a possession entitling the party to notice.

The notice was bad in containing more than one tract or lot.

The premises were sold out of their order. This will avoid the sale. *Wisner v. Chamberlain*, 117 Ill. 579.

Section 224 of the Revenue act makes the tax deed *prima facie* evidence of certain things; and then provides that "any judgment for the sale of real estate for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment or decree, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered; and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or special assessments have been paid, or the real estate was not liable to the tax or assessment."

It is well-known law, that if any portion of the taxes for which judgment is rendered is illegal, the sale is void. Cooley on Taxation, 295-297; *McLaughlin v. Thompson*, 55 Ill. 249; *Gage v. Pumpelly*, 115 U. S. 454.

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Brief for the Appellee. Opinion of the Court.

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Messrs. WILSON & MOORE, for the appellee:

The park commissioners were not in the possession of the lots. The law requires service of the notice only on actual occupants who may be found. *Taylor v. Wright*, 121 Ill. 455.

It is unnecessary, on this point, to consider the number of persons to whom the notice was addressed, in view of the express decision of this court that the notice need not be addressed to any one. (*Frew v. Taylor*, 106 Ill. 159.) The address to individuals is surplusage, and does not affect the notice in any way whatever.

The objection to the notice, then, is, that it contained two lots instead of one. The very extended argument of counsel on this point is perfectly immaterial, in view of the fact that the statute expressly authorizes more than one to be included in a single notice. Rev. Stat. chap. 120, sec. 218.

The statute requiring the lands to be sold in consecutive lists was not disregarded. The lands in each list were sold in their regular order.

The statute of 1879 makes the judgment conclusive of every defense that might have been interposed to the application for judgment, except payment, and the exemption of the property from taxes.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

The premises in controversy were sold for taxes on the first day of September, 1882, and purchased by John Carne, Jr. A deed issued on the tax sale January 29, 1885, and the only question presented by the record is, whether the title to the premises passed by the sale and deed.

The objections urged against the tax title, in the argument, are as follows: First, that every person in actual occupancy or possession of the premises was not served with notice of sale; second, that the notice served and published is not a legal notice; third, that the premises in question were sold

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Opinion of the Court.

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out of their order; fourth, that the judgment under which the premises were sold included illegal charges and costs.

Section 216 of the Revenue law provides, that before "any purchaser at a tax sale shall be entitled to a deed, he shall, among other things, serve or cause to be served a written or printed, or partly written and partly printed, notice of such purchase on every person in actual possession or occupancy of such land, at least three months before the expiration of the time of redemption on such sale, in which notice he shall state when he purchased the land, in whose name taxed, the description of the land he has purchased, for what year taxed or specially assessed, and when the time of redemption will expire."

As a compliance with the above provision of the statute, before the deed issued, an affidavit of Edward W. Cross was filed with the county clerk, as follows: "That he is the agent of John Carne, Jr.; that as such agent, 'deponent, on the 15th day of May, A. D. 1884, being at least three months before the expiration of the time of redemption on the sale mentioned in annexed notice, served a notice, of which the annexed notice is a true copy, on James Doyle, by handing the same to and leaving the same with James Doyle, personally, in said county of Cook. Deponent is acquainted with the land or lots mentioned in said notice, and the person so served was the only person in actual possession or occupancy of the land or lots on the 15th day of May, A. D. 1884.'" On the trial, appellants undertook to prove that the affidavit was not true,—that James Doyle was not the only person in the possession of the premises at the time the notice was served, but on the contrary, the South Park Commissioners were in possession of a part of the premises.

It appears, from the evidence, that in 1873 Daniel H. Horn, who represented Carrie C. Gibbons, gave permission to James Doyle to move on the premises. On December 8, 1873, Doyle accepted a lease of the whole of lots 15 and 16 (the premises

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Opinion of the Court.

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in question), by the terms of which he agreed to pay a rent of \$4.50 per month, and under this lease he occupied the premises from that time until the notice was served on him in 1884.

It is not claimed that the South Park Commissioners had any lease of the premises, or any part thereof, or that the commissioners cultivated or occupied any part of the premises; but it is said that the commissioners stacked hay on a portion of the premises, and thus were in the actual occupancy. We have examined the evidence bearing upon this question, and we do not regard it sufficient to establish actual possession or occupancy in the South Park Commissioners. In 1875 a Mr. Berry obtained the consent of Horn, and the tenant, Doyle, to stack hay on a portion of the premises. Hay-stacks were put up each year, and boards put round them to keep the hay from getting wet. These boards around the hay are spoken of in the argument as hay-barns, but there was no such thing as a hay-barn on the premises. No rent was paid for the privilege of stacking hay on the premises, or agreed to be paid. The commissioners did give Horn and Doyle, and perhaps Kelly, hay; but there was no arrangement or agreement that it should be given or accepted as rent. Doyle and his wife looked after the hay, to keep out tramps and to guard against fire, and their cows, in return, ran around the stack and ate some hay, but the hay thus used was not rent, or so understood.

If the building of a stack or two of hay on a tract of land actually occupied by another, and enclosing the stack with boards to protect it from the rains, is an act sufficient to place the owner of the hay in the actual possession or occupancy of the land, within the meaning of the statute, then it might be said that notice should have been served on the commissioners; but we do not think such was the case. Doyle was residing on the premises with his family, and was in the actual occupancy of the whole of both lots, and the fact that the commissioners had hay on the premises gave them no possession or occupancy, within the meaning of the Revenue law. Sup-

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Opinion of the Court.

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pose a farm of one hundred and sixty acres of land is sold for taxes, and when the purchaser goes upon the premises to serve notice on those in actual possession, he finds A residing on the land under a lease for the entire tract. When a notice is served on A the terms of the statute have been observed, and the purchaser concludes that he has done all that the law requires. But it turns out, on one part of the farm there is standing a crib of corn belonging to a tenant who occupied the premises the year before. On another part of the farm is a bin of wheat belonging to a former tenant. On another part is a stack of hay purchased by some person residing in the neighborhood. Are all these persons actual occupants of the premises, and entitled to notice? We think not. To so hold would render the statute absurd; and yet, if notice was required to be given the South Park Commissioners, it would also be required in the cases supposed.

As has been heretofore said, the first part of section 216 of the Revenue law requires the purchaser at a tax sale to serve a notice on every person in actual possession or occupancy of the land, and also on the person in whose name the land was taxed. The last part of the section provides, that if no person is in the actual possession of the land or lot which has been sold for taxes, and the person in whose name the same was taxed can not be found in the county, then such purchaser shall publish such notice in some newspaper printed in such county, which notice shall be inserted three times, etc. As a compliance with this portion of the statute, a notice was published, and it is objected that the notice is invalid, because two tracts of land which had been sold, and separate certificates issued for each tract, were included in the same notice.

The statute, in express terms, requires the notice which may be served or published to state when the land was purchased, in whose name taxed, the description of the land, for what year taxed, and when the time of redemption will expire. If a notice omitted any one of these requirements, it would be ab-

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Opinion of the Court.

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solutely void. But whether one or more tracts of land may be incorporated into the notice, the statute is silent. The statute does not prohibit the purchaser from inserting two or more tracts in one notice, and in the absence of a prohibition, and in view of the fact that the statute is silent in reference to what the notice may contain in this regard, we perceive nothing which will forbid the purchaser from exercising his own judgment on the subject. Upon an examination of section 218, a clear recognition of the right to insert more than one tract in the notice will be found. That section relates to the fee which shall be charged by the publisher of the newspaper for the publication of the notice, and in the last clause it is declared: "The fee for such publication shall not exceed one dollar for each tract or lot contained in such notice." If the legislature had intended, by the enactment of section 216, that a purchaser should not incorporate in his notice more than one tract of land, why was the language just quoted used? Moreover, the insertion of more than one tract in a notice can not mislead those who were entitled to redeem, nor could it injure any one, and hence we do not hesitate to place the construction on the statute that we do.

The next point relied upon is, that the premises in question were sold out of their order. The facts in regard to the manner in which the sale was conducted are contained in a stipulation found in the record, executed by the parties, from which we quote the following: "The tax judgment, sale, redemption and forfeiture record shows that at the time advertised for that purpose the tax sale began with 'List No. 1,' and the property described therein was sold in regular order until property in the town of Lake was reached. Before selling property in the town of Lake for general taxes, sale was made of property in the town of Lake under special assessments, after which the sale proceeded under 'List No. 1,' selling property in the town of Lake for general taxes; after which some intermediate towns were sold for general taxes, there being no special assessments

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Opinion of the Court.

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therein; then, when Hyde Park was reached for general taxes, the sale for delinquent lands therein for special assessments was first made, and when this had been completed, continuing under 'List No. 1,' the sale of Hyde Park property for general taxes was made, including the lots in question."

Section 201 of the Revenue law requires the collector, on the day specified in the notice for the sale of real estate for taxes, "to offer for sale, separately and in consecutive order, each tract of land or town or city lot in the said list, on which the taxes, special assessments, interest or costs have not been paid." The question presented is, whether this provision of the statute was violated in the sale of the premises here involved.

The collector has no power to disregard the language of the statute, which requires a sale of lands in consecutive order. If he does so, a sale could not be sustained. These lands were on a list delinquent for general taxes, and, as we understand the record, that entire list was sold in consecutive order. There was, however, in some of the towns,—for example, Towns of Lake and Hyde Park,—another list, embracing lands upon which judgment had been rendered for special assessments. When these towns were reached, in the progress of the sale, the collector, before selling the list for general taxes, sold the list delinquent for special assessments. We do not think this was a violation of the statute. The collector, in proceeding with the sale in the regular order in which the lands were advertised, when he reached a town where there were two lists, had the discretion to take up either list first which he saw proper. This he did in every town in Cook county, during the progress of the sale. When a town was reached where lands were delinquent for special assessments, that list was first sold, and then he proceeded with the list for general taxes.

The last point relied upon to defeat the sale is, that the tax judgment under which the premises were sold included illegal taxes. The territory of the village of Hyde Park is co-extensive with that of the town of Hyde Park, but the two organizations

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Opinion of the Court.

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are in no manner connected with each other. An assessor and collector are elected each year in the town, but the village of Hyde Park has no such officers. It appears, however, from the evidence, that in the appropriation ordinance of 1881, adopted by the village, the sum of \$900 was appropriated for town collector's salary, and \$1200 for town assessor's salary. Of course, the village of Hyde Park had no authority to pay the salary of the town officers, and it had no right whatever to levy a tax to raise money for that purpose. The levy, so far as the \$2100 is concerned, was illegal. The result was, nineteen cents were added to the taxes on one of the lots, and twenty-seven cents to the taxes on the other lot. These amounts formed a part of the judgment for taxes upon which the premises were sold, and the question arises, whether such illegal taxes rendered the judgment and sale void. It is claimed by appellee that the defect relied upon is cured by section 224 of the Revenue law, as amended in 1879. The section makes the tax deed *prima facie* evidence of certain things, and then provides that "any judgment for the sale of real estate for delinquent taxes, rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment or decree, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered; and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or special assessments have been paid, or the real estate was not liable to the tax or assessment."

We do not concur in the view of appellee, but we think it is clear that this case falls within the exception named in the last clause of the section. A portion of the taxes levied were illegal, and the land was not liable for such tax. The fact that a large proportion of the tax was legal does not change the

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Syllabus.

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result. The illegal portion of the tax rendered the judgment and sale void. *McLaughlin v. Thompson*, 55 Ill. 249, is a case in point. There it was held, that if any portion of the tax upon which a judgment is rendered was illegal, or if the judgment was for too large a sum, a sale and tax deed based upon such judgment would be void. The same doctrine is announced in *Riverside Co. v. Howell*, 113 Ill. 256. As the real estate was not liable for the tax as levied, the judgment did not prevent appellee from relying on the illegality of the tax.

We think the court erred in holding the tax sale valid, and for this error the judgment will be reversed as to lots 15 and 16, block 2, Yearby's subdivision (the property herein involved), and the cause will be remanded.

*Judgment reversed.*

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THE NORTH CHICAGO CITY RAILWAY COMPANY

v.

JOHN GASTKA.

*Filed at Ottawa May 16, 1889.*

1. **MASTER AND SERVANT—*respondeat superior—generally.*** Where the relation of master and servant exists between a city railway company and a person whose act may be the cause of an injury to another, the company will not be liable, if the servant, in causing the injury, is not acting within the scope of his employment; but the master will be responsible, when the servant acts within the general scope of his employment, for acts done while engaged in his master's business, with a view to the furtherance of that business, by which injury is caused to another, whether negligently or wantonly committed.

2. **SAME—*ejecting passenger from street car—without due care on the part of the servant.*** If a person is a trespasser upon a street railway car, or is unlawfully riding thereon without the payment of fare, and the conductor undertakes to remove the intruder, he must act in a prudent manner, and exercise due care for the safety of such person; and if he fails to do so, and in consequence thereof such person is injured, the railway company will be liable for the injury.

128	613
53a	285
54a	285
128	613
67a	66
128	613
75a	583
128	613
83a	196
128	618
94a	92
95a	668
128	618
102a	648
128	618
107a	652

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Brief for the Appellant.

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3. CONTINUANCE—*absence of witnesses.* Certain witnesses of a defendant, duly subpoenaed, failed to appear when he had finished his other evidence, and he asked time to procure the absent witnesses. The court refused to delay longer than fifteen minutes. On motion for a new trial, the defendant, by affidavit, showed these facts, and the materiality of the testimony of the witnesses, but failed to show that the absence of the witnesses was not by his consent: *Held*, that for this omission alone the defendant failed to make a proper showing.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. W. C. GOUDY, for the appellant:

Even if a servant is engaged in the performance of his duty to his master, yet if he, personally and wholly for a purpose of his own, does an act not connected with the business of such master, and not intended by him to further the objects of such employment, the master is not liable for an injury thereby occasioned. Cooley on Torts, 535; Wharton on Negligence, sec. 168; *Tuller v. Voght*, 13 Ill. 277; *Oxford v. Peter*, 28 id. 434; *Porter v. Railroad Co.* 41 Iowa, 358; *McManus v. Cricket*, 1 East, 106; *Wright v. Wilcox*, 19 Wend. 343; *Howe v. Newmarch*, 12 Allen, 49; *Johnson v. Barber*, 5 Gilm. 425.

It has been held by courts of the highest respectability, that the willful and malicious throwing of a passenger from the car, by the conductor of a street car, is not an act done in execution of a duty of the conductor to his employer, and that the street car company is not liable therefor. *Isaacs v. Railroad Co.* 47 N. Y. 122; *Railroad Co. v. Donahue*, 70 Pa. St. 119; *McKeon v. Railroad Co.* 42 Mo. 79.

A newsboy selling newspapers on the street, and accustomed to board street cars, with the acquiescence of the servants of the company, for the purpose of supplying the passengers with papers, is not a passenger, and the company is not charged with the duty of looking after his safety, or of seeing that he does not run into danger, or of stopping the speed of the car

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Opinion of the Court.

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for him to leave, whether requested to do so or not. Thompson on Carriers of Passengers, 46; *Fleming v. Railroad Co.* 1 Abb. (N. C.) 433; *Blackmore v. Railroad Co.* 38 Upper Can. (2 B.) 172.

Whenever an injury has been caused by the conduct of a servant in the business of his master and within the scope of his employment, the master has been held liable, although such conduct may have been tortious. The question of liability does not depend entirely on the quality of the act, but rather upon the other question, whether it has been performed in the line of duty, and within the scope of the authority conferred by the master. *Seymour v. Greenwood*, 7 H. & N. 355; *Limpus v. Omnibus Co.* 1 H. & C. 526; *Goff v. Railway Co.* 3 E. & E. 672.

A new trial will be granted on the ground of surprise, when a material witness who has been subpoenaed withdraws, or absents himself, so that his testimony can not be taken. *Hilliard on New Trials*, (2d ed.) 536; *Tilden v. Gardner*, 25 Wend. 653; *Ruggles v. Hall*, 14 Johns. 112.

The non-attendance of a material witness, or the absence of a material piece of testimony, contrary to reasonable expectation, and satisfactorily accounted for, will induce the court to set aside the verdict and grant a new trial. 1 Gra. & Wat. on New Trials, 209; 3 Wait's Prac. 402; *Oakley v. Sears*, 7 Rob. 111; *Cotton v. State*, 4 Texas, 264.

Mr. JOHN GIBBONS, and Mr. FRANK H. GOIN, for the appellee.

Per CURIAM: This was an action of trespass on the case, to recover for personal injuries. The declaration contained three counts. The second count in the amended declaration sets up plaintiff's cause of action more fully than either of the other counts, and it is in substance as follows: "That on the 18th day of August, 1885, defendant was operating a city passenger railway in the city of Chicago, and was possessed of certain cars drawn by horses for the conveyance of passengers

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Opinion of the Court.

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upon said railway; that divers newsboys, for a long time prior to the happening of the grievances complained of, were accustomed to go upon said cars to sell newspapers to the passengers upon said cars, with the knowledge, consent and approbation of, and without the objection of, defendant, and plaintiff, as such newsboy, on the day last aforesaid, boarded a certain passenger car possessed by defendant, for the purpose of selling newspapers to the passengers who had taken passage on said car, as he lawfully might; that while plaintiff was lawfully upon said car, and in the exercise of due care, defendant, through its servants and agents, without notice to plaintiff to get off said car, and without any warning to plaintiff, then and there violently, negligently and unlawfully cast and threw plaintiff, with great force and violence, to the ground there, and certain horses of defendant, and a certain passenger railway car of defendant drawn by said horses, and moving in an opposite direction to which said first mentioned car was running, tramped upon and ran over the body and legs of plaintiff, and by reason of being then and there tramped upon and run over, divers bones of plaintiff's body were broken, and the legs of plaintiff were crushed, contused, mangled, lacerated and broken, and he became and was sick, sore, lame and disordered, and so remained from thence hitherto, during all which time plaintiff thereby suffered great pain, and was prevented from transacting his ordinary business." To the declaration the defendant pleaded the general issue, and on a trial before a jury the plaintiff recovered a judgment, which was affirmed in the Appellate Court.

It is insisted on behalf of the North Chicago City Railway Company, that it is not liable, for the reason that "the act of throwing the plaintiff from the car, was the violent, wanton and malicious personal act of Bullock, (the conductor,) and he, alone, is liable." Much of the argument has been devoted to establish this proposition, and quite a number of authorities have been cited to sustain the view of the defendant. We

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Opinion of the Court.

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do not think there is any difficulty in reference to the law upon this question. Where the relation of master and servant exists between the railway company and the person whose act may be the cause of an injury to another, the company will not be liable if the servant, in causing the injury, is not acting within the scope of his employment; but, on the other hand, the law is equally well settled that the master will be responsible, where the servant acts within the general scope of his employment, for acts done while engaged in his master's business with a view to the furtherance of that business, by which injury is caused to another, whether negligently or wantonly committed. *Chicago, Milwaukee and St. Paul Ry. Co. v. West*, 125 Ill. 321.

It was claimed on the trial of the cause in the trial court, by the defendant, that the conductor did not push the plaintiff off the car, but that plaintiff of his own accord jumped off the car and was thus injured, and so the conductor testified. But here the defendant seems to have changed his line of defense, claiming that the injury was the result of the wanton and malicious personal act of the conductor. In the view we take of the case, it will not be necessary to stop to inquire which theory of the defendant may be correct on the question of fact, or, indeed, whether either was sustained by the evidence. Under the rule laid down in the case cited, if the plaintiff was injured by the act of the conductor when acting under the general scope of his employment, the defendant will be liable. The conductor had charge of the car. One of his duties was to collect fares from persons who might enter the car. Now, while engaged in the discharge of this duty, in passing through the cars he came to the plaintiff, who a short time before had entered the car, and, as the evidence introduced on the part of plaintiff tended to prove, he pushed the plaintiff off the car. The testimony of the conductor of itself is enough to establish the fact that he was acting within the general scope of his employment when the plaintiff was put

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Opinion of the Court.

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off the car. He testified: "I got to Chicago avenue, and there was an old gentleman got on. We got near Superior street. We started up again. We got between the blocks. This boy jumped on the car. I started to go around to collect fares, and in so doing I swung off the back platform, and shouted to the boy, 'Look out there,' and he jumped off and the car coming north caught him. The boy was about five feet from me, I guess, when he jumped from the car. I was just swinging off from the rear platform." Whether the plaintiff was a trespasser on the car, or was unlawfully riding on the car without the payment of fare, was a matter of no moment. If plaintiff had no right on the car, and the conductor, in the discharge of his duty as manager of the car, undertook to put him off, the law required him to act in a prudent manner, and exercise due care for the safety of the plaintiff, and if he failed to do so, and in consequence the plaintiff was injured, the defendant was liable.

The court gave, on behalf of the plaintiff, four instructions, and in the argument it is claimed that they are all erroneous. The instructions may contain technical inaccuracies, but in the main we regard them as correct. They contain nothing calculated to mislead the jury.

All the instructions asked on behalf of the defendant, ten in number, were given as asked. There is therefore no just ground for claiming that the jury were not fully instructed.

One other question remains to be considered. Two witnesses who had been subpoenaed to attend and testify for the defendant, and who had been in attendance, failed to appear when the defendant had finished introducing his other evidence, and the defendant requested time to procure the witnesses. The court delayed the cause some fifteen minutes, and then refused to wait longer for the witnesses. On the motion for a new trial, an affidavit on behalf of defendant was read, showing the facts relied upon on this branch of the case. It may be that the evidence of the witnesses would have been

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Syllabus.

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material; but it nowhere appears, from the showing of the defendant, that the absence of the witnesses was not by its consent, and upon this ground, alone, the defendant failed to make a proper showing.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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THE ELGIN, JOLIET AND EASTERN RAILROAD COMPANY

v.

JAMES M. FLETCHER *et al.*

*Filed at Ottawa May 16, 1889.*

1. **EMINENT DOMAIN—measure of damages—how far controlled by the stipulation of petitioner.** It is competent upon the trial of a condemnation proceeding, for the petitioner to bind itself, by an offer in open court, to the performance of duties, such as to inclose its right of way over the defendant's land in a shorter time than required by statute, and construct and maintain a suitable and proper underground crossing under the road-bed, etc., and thereby, and to the extent that such performance will prevent damages that would otherwise occur, abridge the land owner's claim for damages.

2. Where the petitioner, on the trial, offers and agrees to fence its right of way over defendant's land, and make the necessary, suitable and proper farm crossings and cattle-guards on or before a day named, which is a less period than the statute fixes, all the damages recoverable because of the road not being fenced, or for want of crossings, etc., will be those sustained before the day named.

3. **SAME—judgment of condemnation subject to performance of stipulation.** Where the petitioner, on the trial, in open court, agrees to perform duties not required by the statute, or in less time than the law requires, for the purpose of lessening the damages, the judgment should vest the rights obtained by the condemnation, subject to the performance of such duties, so as to insure their performance.

4. **SAME—offer of petitioner—how far binding as a contract.** If an offer of the petitioner, in open court, on the trial, to make fences, crossings, etc., in a shorter period than that required by statute, is taken in consideration in the assessment of damages, the liability of the petitioner in that regard will thereafter become one by virtue of express

128	619
137	323
128	619
61a	662
128	619
165	304
165	339
167	681
128	619
171	441
128	619
79a	58
128	619
192	*376
128	619
194	3 95
101a	*668
128	619
203	*178
128	619
e110a	327
128	619
118a	*245

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Brief for the Plaintiff in Error.

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contract, and if the contract is not performed, an action will lie for its breach.

5. SAME—*binding character of offer of petitioner as a question of law or fact.* Whether an offer by a railway company, on the assessment of damages for a right of way, to fence its road and make crossings by a day named, is binding on the company, is not a question of fact for the jury, but is purely a question of law, and it is error to submit such question to the jury as one of fact.

6. PRACTICE—*improper remarks of counsel to the jury.* A court hearing counsel, under pretense of arguing a case, making statements of matters to the jury not in evidence, nor pertinent as illustrative of matters in evidence, should promptly stop him, explain to the jury the impropriety of his language, and take such measures as are appropriate to prevent a repetition of such misconduct, and for a failure of duty in this respect manifestly affecting the result, the judgment should be reversed.

7. In such case, the counsel whose client is unfavorably affected by such statements, should call the attention of the court to them at the time, lest the court might not otherwise have noticed the same.

WRIT OF ERROR to the County Court of Du Page county ; the Hon. CHARLES A. BISHOP, Judge, presiding.

Mr. NOAH E. GARY, for the plaintiff in error:

The court erred in refusing to give this instruction, asked by the appellant :

"The jury are instructed, that the petitioner railroad company is bound by the statute, within six months after any of its line is open for use, to erect and thereafter maintain fences on both sides of so much of its road as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on such railroad, excepting at the crossings of public roads and highways, with gates or bars at the farm crossings of such railroads; and also to construct such farm crossings wherever they are necessary, for the use of the proprietors of the lands adjoining such railroad; and also to construct and maintain at all highway or public road crossings now or hereafter existing, cattle-guards, suitable and sufficient to prevent cattle, horses, sheep, hogs and other stock from getting on such railroad; and the jury have no right in

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Brief for the Defendants in Error.

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this case, in estimating the damages, to take into consideration any loss, inconvenience or damage resulting from the failure of the petitioner to maintain such fences, farm crossings or cattle-guards at highway crossings, as above stated."

This instruction follows the provisions of the statute in every substantial particular, and no one was given upon the subject therein embraced.

It is insisted the first instruction given by the court at the request of respondents is erroneous. By it the jury were instructed that the petitioner was not bound to fence any portion of its railroad until six months after such part of its line was open for use, and that the jury might consider whatever damages they might believe, from the evidence, would be caused by reason of leaving open the tracks for six months, unless, the court added, the petitioner had stipulated, in open court, that it would, May 1, 1888, construct and thereafter maintain suitable fences. The petitioner had, in open court, stipulated that it would, on or before May 1, 1888, construct and thereafter maintain suitable and statutory fences, and would construct and maintain a suitable and proper underground crossing, twelve feet square. This stipulation was binding. *Railroad Co. v. Railway Co.* 105 Ill. 388; *Hayes v. Railroad Co.* 54 id. 373.

As to the alleged improper statements and remarks of counsel, see *Railroad Co. v. Johnson*, 116 Ill. 210; *Railroad Co. v. Bragonier*, 13 Bradw. 467; *Jackson v. People*, 18 id. 519; *Chase v. City*, 20 id. 279.

Messrs. BOTSFORD & WAYNE, for the defendants in error:

The refused instruction of which complaint is made, is in conflict with *Railroad Co. v. Kirby*, 104 Ill. 345, and *Railroad Co. v. Rixman*, 121 id. 214.

The offer of appellant's counsel was of no binding effect on the railway company. It purports to have been made on the authority of the engineer of the road, but nothing is shown

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Brief for the Defendants in Error.

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that authorized the engineer to thus bind the company. He, it seems, was present, and if he had with him any such authority, counsel, if sincere, would have shown the fact.

The cases referred to by counsel in support of his position show a different state of facts. In the case of *Hayes v. Railroad Co.* 54 Ill. 373, there was a stipulation written out, signed by the president, secretary and treasurer of the company, and filed in the case. In the case of *Railroad Co. v. Railway Co.* 105 Ill. 388, there was a stipulation, signed by the company, filed in the case, and offered in evidence. The court sustains these stipulations, because "they were executed in a manner to be obligatory on petitioner." But in the case at bar there was no binding obligation of the company. It was so understood, as the case went on with this element of damages still before the jury.

Admit that in the opening speech of counsel for the defense improper remarks were made, yet the court, so soon as his attention was called to the matter, rebuked counsel. It is not sufficient for counsel, when improper remarks are being addressed to a jury, to silently except, as the court may be engaged in preparing or reviewing instructions, but counsel should, by some positive act, call the attention of the court to the fact. *Wilson v. People*, 94 Ill. 299; *Mayes v. People*, 106 id. 306; *Bulliner v. People*, 95 id. 394.

But the rule is almost universal, in both criminal and civil cases, that the appellate court will not reverse a case for improper remarks of counsel made in argument to the jury, unless made in violation of some statutory provision, or neglect of the trial court, when appealed to, to correct the abuse. And we believe the rule further to be, without exception, that a reversal will not be held in any case where the verdict of the jury is fully sustained by the evidence. *Garrity v. People*, 107 Ill. 163; *Baysinger v. People*, 115 id. 419; *Railroad Co. v. Johnson*, 116 id. 206; *Henry v. Railroad Co.* 121 id. 264; *Felix v. Scharnweber*, 119 id. 445; *Spies v. People*, 122 id. 1.

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Opinion of the Court.

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Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This is a proceeding under the Eminent Domain act, to condemn right of way for appellant's road, and to assess damages occasioned to land not taken. Appellees own a farm of about 314 acres, through which the line of appellant's road runs, taking for right of way about  $9\frac{21}{100}$  acres, and dividing the farm so that there are about 184 acres on the east side of the road, and 120 acres on its west side.

There is a serious conflict in the evidence on the question of damages to the land not taken. The jury, in their verdict, assessed the value of the land taken, and the damages to land not taken, at the aggregate sum of \$3700, and the court gave judgment upon this verdict.

Wallace F. McChesney, upon his examination as a witness, testified that he thought the land taken was worth \$70 per acre, and that the damages to the land not taken were \$1000, and he then said: "I have added \$500, because the right of way may be unfenced for six months—that is included." Thereupon the attorney for appellant addressed the court as follows: "The chief engineer of the petitioner company has just arrived, and I wish to state in open court, by authority of the engineer, and in his presence, and as counsel for the petitioner, that it hereby agrees it will, on or before May 1, 1888, enclose its right of way over respondents' land in question, with suitable and statutory fences, and thereafter maintain the same, and that it will, in building its road, construct and thereafter maintain a suitable and proper underground crossing, at least twelve feet square, on respondents' land in question, and under petitioner's road-bed."

The court, at the instance of appellant, instructed the jury, among other things, as follows:

"The jury are instructed, that in this case the petitioner railroad company has, in open court, stipulated that it will, on or before the first day of May, A. D. 1888, construct, and

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Opinion of the Court.

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thereafter maintain, suitable fences along its right of way over the property of the respondents, and that it will construct and permanently maintain an under-crossing, twelve feet square, and that the jury, in considering of their verdict, have the right to assume that the proposal and agreement of said petitioner will be carried out, and the jury, in fixing their verdict, should not take into account any failure of the petitioner to keep and observe its agreement with reference to such fences and under-crossing."

One of the instructions given at the instance of appellees is as follows:

"The jury are instructed, that the railroad company is not bound by law to fence any portion of its railroad until six months after such part of its line is open for use, and in determining, in this case, whether the defendants sustained damages, and in fixing the amount thereof, the jury may consider whatever damages they may believe, from the evidence, will be caused to the defendant by reason of leaving the railroad tracks open and without fences for the said period of six months after it is open for use, unless the jury further believe the petitioner railroad company has, in open court, stipulated that it will, on or before the first day of May, A. D. 1888, construct, and thereafter maintain, suitable fences along its right of way on the property of respondents."

Appellant asked, but the court refused to give, an instruction reciting the statutory duty of the appellant to make fences within six months after the time that its line is open for use, and to construct farm crossings, cattle-guards, etc., and concluding thus: "And the jury have no right, in this case, in estimating the damages, to take into consideration any loss, inconvenience or damage resulting from the failure of the petitioner to maintain such fences, farm crossings or cattle-guards at highway crossings, as above stated."

It is recited in the judgment of condemnation, among other things, as follows: "It is therefore ordered and adjudged by

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Opinion of the Court.

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the court, that judgment be and the same is hereby entered herein upon the said verdict, and that the said petitioner, upon payment to the county treasurer of the sum of \$3700 for the use of James M. Fletcher and Mark W. Fletcher, and to be paid to them on demand, taking their receipts therefor, respondents herein may enter upon and have that portion of the premises described in the petition filed herein, to-wit: " (Here follows a description of the land taken.) "And subject to the obligation of the petitioner to fence the same, on or before May 1, 1888, and to establish an underground crossing and grade crossing, as stipulated upon the trial."

Before the giving of any evidence, the jury viewed the premises, and thus had an opportunity to acquire personal knowledge of the manner in which the farm is affected by the road.

No discussion can be needed to show that if the instruction quoted, which was given at the instance of appellant, was properly given, the instruction quoted, which was given at the instance of appellees, was improperly given. If the offer to make fences, crossings, etc., was binding on appellant, it superseded the statutory duty to make fences, etc., for it provided they should be made within a shorter period than that provided by statute. The liability of appellant, in that regard, thereafter became one by virtue of express contract, and if the contract should not be performed, suit would lie for its non-performance, at any time after the first of May, 1888; and hence, all the damages that could be included in the judgment here, because of the road not being fenced and for want of crossings, etc., are those to be sustained before the first of May, 1888. And so, on the other hand, if the offer to make fences, crossings, etc., was not binding, the statutory liability would apply, and damages should be assessed for not fencing, etc., until the expiration of six months after the road is open for use; and in that view, the jury should have been told, as asked by appellant, that no damages should be included in this judgment for not fencing, etc., after that period. Whether the

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Opinion of the Court.

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offer to fence, etc., is binding on appellant, is not a question of fact for the jury. It is purely a question of law, as the court treated it in the instruction quoted, given at the instance of appellant; and it was therefore error to afterwards submit it, as was done by the instruction quoted, given on behalf of appellee, as a question of fact to the jury.

We think it is competent, upon the trial of a condemnation case, for the party seeking condemnation to bind itself, by an offer in open court, to the performance of duties like those here offered to be performed, and to thereby, and to the extent that such performance will prevent damages that would otherwise occur, abridge the claim by the land owner for damages. (*Chicago and Alton Railroad Co. v. Joliet, Lockport and Aurora Railway Co.* 105 Ill. 388; *Hayes v. Ottawa, Oswego and Fox River Valley Railroad Co.* 54 id. 373.) The judgment in such case should vest the rights obtained by the condemnation, subject to the performance of such duties, so as to insure it, and that was sufficiently done here.

It may be, as contended by counsel for appellees, that the difference between the first of May, 1888, and the expiration of six months from opening the road, is not very great. Still, there is a difference in time in favor of the undertaking of the company; and it is impossible to say how much greater the damages assessed may have been upon the assumption that fences, etc., were not necessarily to be built until after the expiration of six months from the opening of the road, instead of by the first of May, 1888. The sum assessed is quite large, and it can not be said that we can see that this error did not affect the amount. *St. Louis, Jacksonville and Chicago Railroad Co. v. Mitchell*, 47 Ill. 165.

Other objections are urged because of the mode of argument pursued, upon the trial, by the attorneys for appellees, but as it is not probable that this objectionable conduct will be repeated upon the next trial, we deem it unnecessary to notice and comment upon it in detail.

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Syllabus.

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A court hearing counsel, under pretense of arguing a case, making statements of matters to the jury not in evidence nor pertinent as illustrative of matters in evidence, should promptly stop the counsel, explain to the jury the impropriety of his language, and take such measures as shall be appropriate to prevent a repetition of such misconduct; and for a failure of duty in that respect, manifestly affecting the result, the judgment should be reversed. But the counsel whose client is unfavorably affected by such statements should call the attention of the court to them at the time, for it might be that, being preoccupied with other matters, they would otherwise escape his attention.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

*Judgment reversed.*

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THE KANKAKEE COAL COMPANY

v.

THE CRANE BROS. MANUFACTURING COMPANY.

128	627
138	206
38a	556
128	627
65a	556
128	627
87a	669

*Filed at Ottawa May 16, 1889.*

**MECHANIC'S LIEN—evidence of indebtedness—to be produced.** The petitioner for a mechanic's lien is bound, on the hearing before the master, or upon the hearing in court, to make out his right to the lien, and for that purpose to produce the original notes given to him, or to account for their non-production. A stipulation that at the time of the filing of the bill the notes, as charged in the bill, were unpaid, and that said notes were dated and due for the amounts as charged, will not obviate the necessity of producing the notes on the hearing.

**APPEAL** from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Kankakee county; the Hon. ALFRED SAMPLE, Judge, presiding.

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Briefs of Counsel. Opinion of the Court.

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Mr. STEPHEN R. MOORE, for the appellant:

The complainant was not entitled to a decree without producing the notes or accounting for the same. *Clement v. Newton*, 78 Ill. 427; *Bayard v. McGraw*, 1 Bradw. 141; *Peck v. Standart*, id. 228; *Rayburn v. Day*, 27 Ill. 46.

Mr. H. K. WHEELER, for the appellee, contended that the stipulation in the case waived the necessity of producing or accounting for the notes.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a petition brought by Crane Bros. Manufacturing Company, against the Kankakee Coal Company and others, to enforce a mechanic's lien. It is alleged in the petition that the Kankakee Coal Company applied to petitioner "to furnish it, for use in its coal mine, on the lands hereinafter named, one horizontal link-motion engine, for hoisting purposes, and that on the 14th day of March, 1883, your petitioner and said coal company made a contract for mine hoisting machinery, to be delivered by your petitioner on board the cars in Chicago, Illinois, for the sum of \$2200, to be paid for, one-third cash, at the delivery of said hoisting machinery, and one-third in three months from date of delivery, and one-third in four months from date of delivery, and that in pursuance of said contract your petitioner made said hoisting engine, and that on the 20th day of July, 1883, was ready to deliver said engine, but that the coal company pretended it could not comply with its said agreement as to the time of payment for said hoisting machinery, and it was then and there agreed that said coal company should pay for said engine as follows: \$741.47 on September 20, 1883, \$746.27 on the 20th day of October, 1883, and \$751.55 on November 20, 1883, by the notes, for said amounts, of said company, all bearing date July 20, 1883; and your petitioner, in pursuance of said agreement, delivered

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Opinion of the Court.

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said hoisting engine to the said coal company, and it was then shipped to the land of said coal company, and put in use on said coal land, and used in the operations of the coal mine." It is admitted in the answer that the coal company purchased an engine for hoisting purposes, as is charged in said bill of complaint; that the coal company gave its notes to complainant for the payment of the engine; that the engine is used by the coal company in hoisting coal; that the coal company is in possession of the land mentioned in the petition; but it is denied that a lien can be enforced in equity, under the case made in the petition. Upon replication being filed, the cause was referred to the master, the evidence taken, exceptions to the report overruled, and a decree rendered in favor of petitioner.

Several grounds have been urged for a reversal of the decree, but in the view we take of the record it will only be necessary to consider one of them.

The three promissory notes which were given for the engine were not produced before the master, nor were they presented in the circuit court, or offered in evidence on the hearing. Upon this state of facts a specific objection was made by the defendant in the argument before the master, as follows: "No lien can be enforced unless the notes are delivered up, which is not done." In the master's report the objection was disposed of in the following language: "As to delivering up the notes, the evidence does not disclose where they are, but as complainant can both sue at law and file bill for a lien, I hold he does not have to deliver up the notes. The notes being given to complainant, the presumption is that the company still has them, until the contrary is shown by the defendant." Exceptions were filed to this part of the report, but they were overruled. It will thus be seen that the question was fairly presented before the master, and in the circuit court, whether the petitioner could recover without the production of the notes, or accounting, in some satisfactory manner, for their non-production.

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Opinion of the Court.

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No decree could be obtained in favor of petitioner unless an indebtedness was established, and the notes which had been given for the engine were the evidence necessary to establish the debt. The petitioner was therefore bound to produce the notes or account for their non-production.

There was a stipulation of the parties in regard to certain facts, which, among other things, contained the following: "It is admitted that at the time complainant filed the petition the three notes, as charged in complainant's bill, were unpaid, and said notes were dated and due for the amounts as charged in said bill." And in the argument it is claimed that this stipulation dispensed with the production of the notes. Suppose the notes were unpaid when the bill was filed; that they were dated as alleged, due for the amounts as charged in the bill. This might all be true, and at the same time the notes might be held and owned by a third party. If the notes were held and owned by a stranger when the petition was filed, it is plain that the petitioner was not entitled to a decree. The burden was upon petitioner to establish each fact required by the statute before he was entitled to a decree. One of the contested facts was a *bona fide* indebtedness. That was not proved or admitted.

It has, however, been suggested, that the question was not raised in the circuit court. This is a misapprehension of the condition of the record. The master's report and the exceptions thereto show, beyond dispute, that the question was fairly presented, and relied upon by the defendant, and there was ample opportunity to produce the notes before the master, or on the trial before the court, after the question was raised. We think in this regard the decree is erroneous.

The judgments of the Appellate and circuit courts will be reversed, and the cause remanded.

*Judgment reversed.*

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Syllabus.

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JOSHUA C. SANDERS

128 631  
56a 213  
56a 215

v.

HENRY E. SEELYE *et al.**Filed at Ottawa May 16, 1889.*

1. ATTORNEY AT LAW—*attorney's lien.* Attorneys' liens are classed as general (or retaining) liens, and charging (or special) liens. The first attaches to all papers, documents, etc., which the attorney receives professionally; the second only upon that which is recovered through his professional services. This court has held that the latter of these liens does not exist in this State; but the court now holds, that in a proper case an attorney may, in this State, maintain a general or retaining lien.
2. This retaining lien exists on all papers or documents of the client placed in the attorney's hands in his professional character or in the course of his professional employment, and it makes no difference what the purpose may have been in placing them in the attorney's hands.
3. SAME—*lien in favor of different firms.* Where a client knows that an attorney and a firm of attorneys are acting together as his attorneys in a case, and he delivers bonds to either one of them, to be used for his benefit in the litigation, the lien will attach on the bonds for the benefit of them all, for any balance due by him to either firm as fees in the case.
4. SAME—*rule on attorney to surrender papers, etc.* If an attorney does not receive bonds of his client in his professional capacity, but only as a mere custodian, the court has no authority to make an order in some other suit requiring the attorney to show cause why he should not surrender them. The fact that the client files his petition in a suit he has had with others, for a rule on his attorney to surrender and deliver up bonds placed in his hands, is inconsistent with the contention that the holder did not receive them professionally, to be used in such suit.
5. SAME—*contract of employment—in what court.* A party wrote a letter to his attorneys, offering to give them \$500 fees for attending to a case in the *Supreme Court.* The case had to go the Appellate Court, and preparation was being made to take the case there. The whole correspondence between the attorneys and client showed that the services contracted for were services in the *Appellate Court:* Held, that the court below was justified in finding that the special contract related to the Appellate and not the Supreme Court.

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Brief for the Appellant.

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APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. D. T. CORBIN, for the appellant:

Attorneys have no lien, in this State, for their professional services, upon a *quantum meruit*, upon railroad bonds of their client involved in litigation conducted by them. *Humphrey v. Browning*, 46 Ill. 476; *Forsythe v. Beveridge*, 52 id. 268; *LaFramboise v. Grow*, 56 id. 202; *Lucas v. Campbell*, 88 id. 447; *Nichols v. Pool*, 89 id. 491.

When an attorney accepts possession of his clients bonds involved in litigation being conducted by him, with the distinct understanding and agreement that he is to place them in a safe place, and hold the same subject to his client's order, the client is entitled to have such bonds on demand; and such agreement constitutes a waiver of any lien thereon for professional services, even if it otherwise existed. *Darlington v. Chamberlain*, 20 Bradw. 443; *Walker v. Birk*, 6 D. & E. 258; Overton on Liens, 143; *Firth v. Forbes*, 4 DeG., F. & J. 409.

Liens, when they exist, do not attach to papers received by the lawyer in any other than a professional capacity. *Bozen v. Bolland*, 4 M. & C. 354; *Wickens v. Townsend*, 1 R. & M. 361; *Ex parte Nesbett*, 1 S. & L. 279; 1 Hoffman's Ch. Pr. 35.

If papers are delivered to the lawyer only for a specific purpose, he can have a lien only in respect to such purpose, and not in respect to other transactions. *Lawson v. Dickinson*, 8 Mod. 306; *Balch v. Syrnes*, 1 Turner, 192.

When attorneys are co-partners when they accept a retainer, the contract of retainer is a joint and continuing one, and neither of the partners can be released from its obligations, either by a dissolution of their firm or by any other act or agreement between themselves. Whatever is done by either in defense of a suit (retained in before dissolution) after dissolution, is done under the contract of retainer which they had

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Brief for the Appellant.

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previously made with their client, as much as if they had not dissolved. *Walker v. Goodrich*, 16 Ill. 341.

The employment of one of a firm of attorneys is the employment of all. *Eggleston v. Boardman*, 27 Mich. 14.

It is the duty of the several members of a law firm retained to attend to legal business, to go on and complete their contract, after dissolution of the partnership, without reference to having entered into a new partnership. *Moshier v. Kitchell*, 87 Ill. 18.

The law of principal and agent is generally applicable to that of client and attorney. Wharton's Com. on Agency and Agents, 580.

If the agent does not perform his appropriate duties, or if he is guilty of gross negligence, or gross misconduct, or gross unskillfulness, in the business of his agency, he will not only become liable to his principal for any damages which the latter may sustain thereby, but he will also forfeit his commissions, and in case of a solicitor, will forfeit his fees. Story on Agency, (9th ed.) sec. 331; Mechem on Agency, sec. 832; *Prescott v. White*, 18 Bradw. 322; *Sea v. Carpenter*, 16 Ohio, 412; *Segar v. Parish*, 20 Gratt. 672.

The measure of damages in an action against the attorney is the actual loss sustained as the natural, direct and proximate result of his negligence or default. Mechem on Agency, sec. 835; *Stevens v. Walker*, 55 Ill. 151.

At the time of employing an attorney, the party and attorney may agree upon the amount of compensation. When such a contract is fairly made, it is conclusive upon both parties, unless its provisions have been waived. *Stanton v. Embrey*, 93 U. S. 548; *Planters' Bank v. Hornberger*, 4 Cald. 531; *Bright v. Taylor*, 4 Smed. 159; *Tapley v. Coffin*, 12 Gray, 420; *Yates v. Robertson*, 80 Va. 475; *Badger v. Gallaher*, 113 Ill. 662; *Ripley v. Bull*, 19 Conn. 56; *Hitchings v. VanBrunt*, 38 N. Y. 335; *Broodman v. Brown*, 25 Iowa, 449; Mechem on Agency, 843.

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Brief for the Appellees.

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Mr. D. J. SCHUYLER, for the appellees:

At common law an attorney has a retaining lien on the papers and documents of his client that come into his hands in the course of his professional employment, and such lien extends to the general balance due him from the client. Story on Agency, sec. 383; Wharton on Agency, sec. 623; Stokes on Attorney's Liens, 1-5; 1 Jones on Liens, secs. 115, 119; Weeks on Attorneys, 607; *Forsythe v. Beveridge*, 52 Ill. 270; *Wright v. Cobleigh*, 21 N. H. 340; *Dennett v. Cutts*, 11 id. 163; *Stephenson v. Blacklock*, 1 M. & S. 535; *St. John v. Diefendorf*, 12 Wend. 260; *Ex parte Sterling*, 16 Ves. 258.

There are two kinds of liens of attorneys treated of in the authorities, viz.: First, the retaining lien, or the right to retain possession of a client's papers which have gone into the attorney's hands in the course of his professional employment; and second, the charging lien, or the right to charge the client's property which is not in the attorney's possession, with the payment of the debt. Stokes on Attorney's Liens, 1, 2; Story on Agency, sec. 383; Wharton on Agency, secs. 623, 625.

The authorities cited by appellant's counsel to show that attorneys have no lien in Illinois, are all cases concerning the charging lien, and not of the retaining lien. There is a wide distinction to be observed between the retaining lien, which is the right to retain documents of the client in the attorney's possession, and the charging lien, which seeks to charge the fruits of the suit,—for instance, the judgment, or the real estate recovered, or other of the client's property,—with the lien, and which lien does not at all depend upon possession by the attorney. The two liens are entirely different in origin, or grounds on which they are based, and in their nature, extent and mode of enforcement.

Mr. H. E. SEELYE, also for the appellees.

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Opinion of the Court.

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Mr. JUSTICE WILKIN delivered the opinion of the Court:

The case of *Walter L. Peck et al. v. Chicago and Great Western Railroad Land Co. et al.* (a statement of which will be found in 112 Ill. 414-430,) having been reversed and remanded by this court, and pending in the circuit court of Cook county, a dispute arose between appellant and appellees, his former attorneys, as to the fees of the latter, and out of that controversy grew the further one as to whether or not appellees were entitled to a lien upon the one hundred and ninety-five bonds of appellant involved in the Peck suit.

Appellant having discharged said attorneys, tendered them \$175 in full of all fees due them, and demanded the surrender of the bonds, which being refused, he filed this petition for a rule on them to surrender and deliver up the same to him. Upon being ruled to show cause why they should not be required to do so, respondents set up a retaining lien for fees, which they claim were due and unpaid from petitioner, for services rendered by them in said cause, appellees Quick & Miller claiming \$5000 for such services in the Appellate Court for the First District and the Supreme Court, and \$500 for services after the reversal and before they were finally discharged. No special claim for fees was made by respondent Seelye, in the answer, but it was averred that he had rendered services in said cause in connection with said Quick & Miller. Before the master he presented an account for professional services performed for appellant, generally, aggregating \$3650. The cause having been referred to the master to take and report the evidence, together with his conclusions, he made his first report, by which he found that there was due Quick & Miller \$5500, and Seelye \$2840, and also reported that they were entitled to a retaining lien upon the bonds for those amounts. On exceptions to this report, the circuit court held that Quick & Miller were only entitled to the sum of \$300 for services in the Appellate Court, by the terms of an express agreement

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Opinion of the Court.

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between themselves and Seelye on the one part, and appellant on the other; that in addition to that amount they were entitled to \$500 for services performed after the reversal in the Supreme Court. It was also held upon that hearing, that they were entitled to compensation for their services in the Supreme Court upon the *quantum meruit*, there being no contract between the parties as to what should be paid therefor; and the cause was again referred to the master to take evidence, and ascertain the value of such services.

As to that part of the master's report allowing Seelye \$2840, no objection was made, because it was not claimed in the answer, but the objection then urged was, that the allowance was greater in amount than the evidence justified, and the court, upon consideration thereof, reduced it to \$1205.

On the coming in of the master's second report, by which he found the value of the services of Quick & Miller in the Supreme Court to be \$5000, further exceptions were heard, and it was finally determined and ordered that Quick & Miller be allowed the sum \$4950, and Seelye \$1158.25, and that they each have a retaining lien upon said bonds until said amounts should be paid. Sanders having appealed, appellees filed cross-errors in the Appellate Court, by which they sought to question the correctness of the decree below, in not allowing them the full amounts reported by the master. The Appellate Court having affirmed the decree below, Sanders appeals to this court.

The cross-errors are not insisted upon here, and we have therefore only to consider the grounds of reversal insisted upon by appellant. Numerous errors are assigned on his behalf, each of which is made a point in the argument. Many of them are mere criticisms upon the opinion of the Appellate Court, and are in no proper sense assignments of error on the record.

We think the merits of the case may be fully and fairly considered under three heads, viz: First, has an attorney a

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Opinion of the Court.

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retaining lien in this State, as a matter of law; second, are the facts essential to the existence of such a lien established by the proofs in this case; third, does the evidence justify the decree as to the amounts found due.

Attorney's liens are classed as general (or retaining) liens, and charging (or special) liens. The first attaches to all papers, documents, etc., which he receives professionally; the second only upon that which is recovered through his professional services. This latter right of lien has been denied by this court in several cases. In *Humphrey et al. v. Browning et al.* 46 Ill. 476, it was held that he had no lien upon real estate recovered in ejectment; in *Forsythe v. Beveridge*, 52 Ill. 268, that he had no such lien upon a judgment recovered; and so in each of the other cases cited by counsel, it was held that no lien existed in his favor upon the subject matter of the suit. Although expressions are used in the opinions in some of these cases which seem to deny an attorney's right to the retaining lien also, in none of them was that question before the court, nor was it decided. It is now therefore to be treated as an open question in this State.

That it is a well established common law right, must be conceded. *Stephen v. Blacklock*, 1 M. & S. 535; *St. John v. Dufendorf*, 12 Wend. 261; *Bennett v. Cetts*, 11 id. 163; *Walker v. Sargeant*, 14 Vt. 247; *Ward v. Craig*, 87 N. Y. 551. No reason is perceived for denying the existence of that right in this State. There is nothing in our statute which changes the common law relations between attorneys and their clients in such a manner as to affect this right, nor are we able to see wherein this rule of the common law is inapplicable to "the habits and conditions of our society, or contrary to the genius, spirit and objects of our institutions." We therefore hold, that in a proper case an attorney in Illinois may legally maintain such a lien.

Passing to the next question, the authorities seem to be uniform in holding that this retaining lien exists on all papers

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Opinion of the Court.

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or documents of the client placed in the attorney's hands in his professional character or in the course of his professional employment; (*Stokes on Liens of Attorneys*, p. 67; *Weeks on Attorneys*, sec. 372, p. 614; *Wharton on Agency*, sec. 625; *Story on Agency*, sec. 383;) and it makes no difference what the purpose may have been in placing them in the attorney's hands. *Weeks on Attorneys*, sec. 372, *supra*; *Wharton on Agency*, sec. 625, note 1.

Did the bonds in question come into the possession of appellees within the meaning of these rules?. It is insisted that they were left with Seelye merely for safe keeping, subject to appellant's orders, and that their deposit with him had no connection with either his or Quick & Miller's professional employment in the *Peck case*. This position is wholly inconsistent with the remedy appellant is now seeking to enforce. If Seelye was a mere custodian of these bonds for safe keeping, and held them only subject to appellant's order, by what authority can the circuit court of Cook county, in the *Peck case*, make an order requiring respondents to show cause why they do not surrender them? We think, however, that the evidence is clear, to the effect that they were placed in the hands of Seelye as the attorney of appellant in the *Peck case*, so that they might be used in securing to the client the benefits resulting to him from the successful litigation of that case in the Supreme Court; and whatever may have been appellant's understanding as to the amount of fees to be paid, it can not be claimed that he did not fully understand that Quick & Miller and Seelye were acting together as his attorneys in that case. Therefore, whether the bonds were delivered to Seelye alone, or to him and Quick & Miller jointly, the lien would attach for the benefit of all. It is also clear, from the evidence, that appellant knew that these bonds had been deposited by Seelye in the safe of Quick & Miller, and that they claimed a lien upon them for their services; and with such knowledge he permitted them to remain in their possession, retaining them

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Opinion of the Court.

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thereafter in the further management of said cause. We are of the opinion, therefore, that the circuit court was justified in holding that said bonds were subject to a lien in favor of appellees for any balance due and unpaid them for their fees as the attorneys of appellant.

That there was a balance of \$500 due Quick & Miller is not controverted, and the exceptions filed to the master's report allowing Seelye certain fees, must be held to amount to an admission that there was something, at least, due him. In the exception it is said he should only have been allowed \$805, and it was admitted that of that amount but \$475 had been paid, but it was attempted to charge him with \$160, money and accrued interest furnished to pay taxes, for which it was claimed he had failed to account, thus leaving a balance of \$270, and it was sought to liquidate this amount by a counter-claim of \$500, for damages resulting from a failure to pay taxes for the appellant, of which there is no satisfactory proof whatever. But the principal question in determining whether fees were due and unpaid, is, whether or not the services performed were under a special contract, and therefore can be more satisfactorily considered under the third head.

The relative positions of the parties on this branch of the case may be thus stated: Appellant maintains that he made a special contract with appellees, by which he was to pay \$500 if successful in the Supreme Court, and \$300 if unsuccessful, which position can only be maintained by holding, that whatever services were performed in the Appellate Court were understood to be merely preliminary to a final decision in the Supreme Court, the fees to be paid in both being included in the one contract. Appellees insist that whatever special contract was made, was with reference to fees in the Appellate Court alone, and that they are entitled to a reasonable compensation for all other services,—and so the Supreme and Appellate Courts have held.

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Opinion of the Court.

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Appellant's theory is based upon his letter to appellee Seelye, dated September 25, 1882, in which he says: "Yours 23d inst. was received this A. M. In reply I would say, that the terms on which you propose to have my interest represented and protected in *Supreme Court* on appeal, are not so favorable as I was led to anticipate, and I can not accede to them. \* \* \* I will do this: I will pay for the printing necessary in the case, and I will pay attorney's fees in addition to make the sum of \$500 if successful, if not successful \$300,—that is, the total shall not exceed \$500 in case of success, and only \$300 if not successful. \* \* \* If the thing is a success I may feel different as to remuneration. I don't want any one to work for me without fair compensation if the result is remunerative to me. My proposal relates to a reversal of the *Supreme Court*; as to other acts succeeding, different terms can be fixed." The construction contended for by appellees, and sustained by the lower courts, makes the letter read as though the words "Appellate Court" had been used instead of "Supreme Court." Seelye testifies that he understood the letter in that way, and we think, from all the evidence, the circuit court was justified in holding that Sanders so intended, notwithstanding the express mention of the Supreme Court therein. This, we think, is manifest from the correspondence between the parties, preceding and subsequent to the foregoing letter.

It is admitted that the *Peck case*, long prior, had been appealed by Sanders to the Supreme Court, and the appeal dismissed. Subsequently, Seelye, and Herbert, Quick & Miller, (the latter firm being the predecessors of the firm of Quick & Miller,) by correspondence with Sanders, had been negotiating with him for the privilege of withdrawing the record from the Supreme Court, for the purpose of prosecuting a writ of error on behalf of other parties. On the 28th day of September, 1881, Seelye informed Sanders, by letter, that they had finally succeeded in getting the record, and asked, "Now what shall

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Opinion of the Court.

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we do?" On October 8, 1881, Herbert, Quick & Miller wrote Seelye: "We now have the transcript in our possession to file in the *Appellate Court*. \* \* \* On this a writ of error should be sued out immediately," etc. On the same day Seelye inclosed that letter to Sanders, and wrote him: "Now that we have the record, it seems important that we move upon the enemy's works with as little delay as possible." Sanders had, at all times prior to this date, declined to be a party to the writ of error; but it is clear, from these letters, that he knew that it was to be sued out of the Appellate Court, and not the Supreme Court.

On the 14th day of August, 1882, appellant wrote Seelye, saying: "I write to inquire if anything was done in the Riverside case, looking to a review in the *Supreme Court*." September 14 following, Seelye replied: "The Riverside cases (our side of them) are nearly ready for the *Appellate Court*. \* \* \* We are a little puzzled to know what to do with your interest. \* \* \* No time is to be lost, as the court sits October 3. You know, generally, the steps taken. The outlay of money is mostly made. Doubtless you can make a satisfactory arrangement with counsel engaged, to attend to your interest, with comparatively little pecuniary liability." On the 16th of the same month Sanders replies, in which he says: "I received to-day your letter of the 14th inst., about my making an arrangement with counsel to attend to my interest in the forthcoming Riverside cases, on appeal, in your *Supreme Court*. I am somewhat in a quandary. It is whether I should make petition to the court to order the record returned, and set forth the facts according to which they were obtained, as I have been solicited to do, or acquiesce in your suggestion, and engage counsel to represent me and attend to my interest before the court, on appeal." And he insists, that in consideration of his having given the other parties the use of the record, his interest should be protected without charge.

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Opinion of the Court.

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On the 21st of the same month he again writes Seelye, referring to the case on appeal, saying: "You seem to think you can make favorable arrangements with counsel able to appear for me. Who is he, and what are the best terms you can make with him?" On the 23d Seelye replied, making a proposition as to terms on which he would take the case, saying, "The counsel I have employed are Herbert, Quick & Miller." To this letter he asks for a reply by telegram, but on the 25th Sanders wrote the letter first above mentioned.

On the 28th, Herbert, Quick & Miller wrote a letter to Seelye, in which they say: "We have considered your proposal in behalf of Mr. Sanders, that we represent his interest in the Appellate Court." They go on to state what they expect to do, and say that they "do not expect to succeed without a desperate contest, first in the *Appellate Court*, second, in the *Supreme Court*, and then, if successful, again in the circuit court." In this letter they decline the proposal by appellant. On the same day Seelye enclosed that letter to Sanders, saying, "I submitted your proposition to Messrs. Herbert, Quick & Miller, and have just received the enclosed." On the 30th Sanders replies, concluding his letter with the statement, "I can not change my proposal, and if not accepted I will await and look on, abiding events." October 3 Seelye again wrote him: "I received yours of the 30th ult., yesterday. I have felt that it was very important that your interests should be looked after by some one, and had engaged Mr. Herbert to appear for you when the case should be called to-day." In this letter he speaks of going to the *Appellate Court*, of the case being called at the opening of court, and a motion to dismiss for want of jurisdiction, etc. October 9 he informs Sanders of the death of Mr. Herbert. October 17, that as Mr. Miller was familiar with the case he should go on with it; and he expressly states, "The case now stands in the *Appellate Court*, on a motion to dismiss," etc. October 26 he again informs him, "The *Appellate Court* this morning denied the

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Opinion of the Court.

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motion to dismiss our Riverside case." October 28 Sanders replies: "I have received yours of the 26th inst., informing me that the Appellate Court denied the motion to dismiss appeal."

This correspondence continued during the pendency of the case, and from it it would seem too clear for argument that appellant fully understood that the case was pending in the *Appellate Court*, and not what he termed the Supreme Court; and it is equally clear that he understood, or at least that he was informed, that the negotiations with him as to fees were with reference to the *Appellate Court*, and not the *Supreme Court*. It may be, and probably is, true, that he did not fully understand our system of courts; but no one can read this correspondence and come to any other conclusion than that the parties intended the special contract between them to relate to services rendered in the court in which the case was then pending, and not to some other court of review to which it might be taken.

On the 27th of June, 1883, Seelye informed Sanders that the Appellate Court had affirmed the Riverside cases, and he again inquires, "Now what shall we do? The parties here want to take it up. It rests largely with you to decide. The expense will not be large. Our briefs are printed. We will have the record of the Appellate Court, and a printed abstract of it. We think we had better go in and fight it out." To which he replies: "If the expense is not going to be great, I should be in favor of going up to the Supreme Court. I would like to have some idea what the expense will be. I do not wish to take another leap in the dark, as I did with McCagg. I am willing to sustain my fair proportion. \* \* \* I think it would be unwise to stop here, after all that has been done, and the principal work performed." July 21, 1883, appeal bonds were forwarded by Seelye, to be executed by Sanders, and in the letter accompanying them he states that the costs of the appeal will not exceed \$500. There was no pretence

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Opinion of the Court.

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that there was any contract for attorney's fees in the Supreme Court, except as by the letter of September 25, 1882.

We have carefully examined all the evidence submitted in this case, and we are satisfied that, fairly construed, it justifies the construction placed upon the letter of September 25, 1882, by the circuit and Appellate courts, and that the compensation which the appellees were to receive for services in the Supreme Court was intentionally left by the parties to be fixed by what should appear to be reasonable, in view of the services performed.

The evidence reported by the master, though somewhat conflicting, fully justified his report fixing that amount at \$5000, for Quick & Miller. As to the amount allowed Seelye, the evidence is even more satisfactory, considering it as a whole. But it is insisted that the master in chancery and circuit court allowed him for services in the Appellate Court, whereas the entire \$300 which he and Quick & Miller were entitled to under the letter of September 25, had already been allowed Quick & Miller. In his account presented to the master, item 10 was for "services, counsel and disbursements in your behalf in suit of *C. and G. W. R. R. Land Co. et al. v. W. L. Peck et al.*, in Appellate and Supreme Courts, \$1000." This item was allowed by the master in chancery. Item 6 was for \$2000, which the master allowed for \$1750. On these two items the court allowed but \$1200, and it can not be said that any portion of that sum was necessarily allowed as fees in the Appellate Court.

While this case is not free from difficulty, we are satisfied that the merits are with appellees.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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Syllabus.

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ANDREW J. HOOBLER *et al.**v.*

LYDIA A. HOOBLER.

128	645
145	271
128	645
158	316

*Filed at Ottawa May 16, 1889.*

1. TRIAL BY JURY—in chancery—issues agreed upon—conclusiveness. Where the parties to a bill in chancery agree to the issues of fact to be submitted to the jury, neither of them will be permitted to allege that such issues were improper, either in form or substance.

2. SAME—instruction—whether substituting new issues. On bill to set aside a deed and a contract, on the ground of incapacity in the maker to transact business, and fraudulent and false representations, the court instructed the jury, that if either of these grounds was sustained, the allegation of the bill that said instruments were wrongfully and improperly obtained was made out: *Held*, that this was in no sense a substitution of new issues, but an instruction properly informing the jury as to what facts must be found to entitle the complainant to a verdict upon the issues already submitted.

3. SAME—new trial—verdict against the evidence. On bill to set aside a deed and contract made by a widow to an heir, on the ground that she, owing to old age, bodily infirmity, sickness and mental weakness, was incapable of transacting business, and that false representations were made by the grantee as to the condition and value of the estate and property released, the evidence was directly and sharply conflicting. The jury to whom the issues were submitted found in favor of the complainant, and their finding was approved by the trial court. The complainant's evidence clearly supported the finding and decree, and the evidence for the defendant merely raised a conflict, but there was no such preponderance in the defendant's favor as to show that the jury misconceived or misconstrued the evidence: *Held*, that in such a case the finding of the jury was conclusive in this court.

4. ERROR WILL NOT ALWAYS REVERSE—improper evidence. Where the subject matter of interrogatories to witnesses is proper, and calls for evidence in the main pertinent to the issues raised by the pleadings and submitted to the jury, the fact that some of the questions may have been improper in form will not call for a reversal, when the answers, taken in connection with the entire evidence, have worked no injury to the other party.

APPEAL from the Circuit Court of Livingston county; the Hon. N. J. PILLSBURY, Judge, presiding.

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Opinion of the Court.

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Messrs. STRAWN & PATTON, for the appellants.

Mr. H. H. McDOWELL, and Messrs. McILDUFF & TORRANCE, for the appellee.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a bill in chancery, brought by Lydia A. Hoobler against Andrew J. Hoobler and others, the children and grandchildren and heirs at law of John Hoobler, the complainant's deceased husband. The bill prays for the cancellation of a quit-claim deed executed by the complainant, purporting to convey to Andrew J. Hoobler her interest in the real estate of her deceased husband, and for the recovery of her dower and homestead therein, and for the cancellation of a certain other instrument executed by the complainant, purporting to be an assignment and relinquishment by her to Andrew J. Hoobler, of her widow's award and dower in the personal estate of her said husband, and for the recovery of said award, and of all her other property, rights and interests in said estate. Answers and replications were duly filed, and certain issues having been submitted to and tried by a jury and found for the complainant, a decree was entered in her favor in accordance with the prayer of her bill.

The complainant and John Hoobler were married about the year 1872, both being then somewhat advanced in years, and both having previously been married. They lived together on a place consisting of thirteen acres of land belonging to John Hoobler near Manville, Livingston county, until sometime in the year 1885, and then for some reason which the record does not explain, and which so far as this suit is concerned is immaterial, they ceased to live together, John Hoobler going then or sometime afterward to live with his son Frederick who was residing near him, and the complainant going to her daughter's who was living near Muncie, in Vermilion county. After remaining with her daughter for a few weeks, and visiting for a

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Opinion of the Court.

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short time with other friends, the complainant took up her residence in a small house owned by her in Muncie, where she lived until the death of her husband, which took place April 17, 1886.

John Hoobler, at the time of his death, was the owner of the thirteen acres of land already mentioned, worth about \$1500, and which had been occupied by him for a considerable time as his homestead. He was also the owner of personal property, consisting almost entirely of promissory notes, of the value of \$4000. The complainant was not present at her husband's death, and was not notified and had no information of his last sickness or death until the sixty days during which she as widow was entitled to preference in the appointment of administrator had nearly expired. Having accidentally learned of his death, she caused the proper application to be filed for letters of administration to herself and one Avery, and letters were issued to them accordingly within the sixty days after the death of her husband.

The complainant was about seventy-one years of age at the time of her husband's death, and was then in feeble health. The evidence tends to show that she had then recently suffered an attack of severe illness from which she had not recovered, and that at the time the letters of administration were issued, and at the time of the execution of the instruments which she now seeks to have cancelled, she was still suffering great weakness both of body and mind, consequent upon her illness.

On the 9th day of July, 1886, which was a few days after letters of administration were issued, Andrew J. Hoobler, accompanied by one David Gouty, a grandson of John Hoobler, went to see the complainant at her home in Muncie, Vermilion county. Before going, and before having any negotiations with the complainant in relation to a relinquishment by her of her interest in her husband's estate, he caused a quit-claim deed conveying to him all her interest in her husband's lands, and another instrument assigning and transferring to him all her

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Opinion of the Court.

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interest in his personal estate, to be drafted. These drafts he took with him. He went by rail, but instead of stopping off at Muncie, he went on to Danville and there met Gouty, and was driven back by him in a buggy to Muncie, Gouty claiming that he wished to go to a point several miles beyond Muncie to look for some hay which he intended to buy.

At the interview between Hoobler and the complainant at the house of the latter, brought about as above indicated, Hoobler induced the complainant to execute both of the instruments above mentioned, and the evidence is undisputed that the only consideration given by him to her for said conveyance and assignment was the payment to her of \$100 in money, and an agreement to pay her attorney for his services in the matter of suing out the letters of administration, the fees of said attorney, as was afterwards ascertained, being \$15.

Andrew J. Hoobler seems to have been the member of the family of the complainant's husband with whom the complainant was on the most friendly terms, and the evidence shows, without contradiction, that she reposed in him very considerable confidence. At the interview at which said papers were executed, there were present, in addition to the complainant and Hoobler, said Gouty, and Mollie Long, the complainant's niece, who had been with her for several weeks taking care of her in her illness. The accounts of the interview given by the complainant and Mollie Long on the one hand, and by Hoobler and Gouty on the other, are essentially different. According to the account given by the complainant in her testimony—and she is corroborated in all essential particulars by the testimony of Mollie Long—Hoobler and Gouty came to her house, giving her to understand at first that their errand there was to hunt for some hay, and asking her where she thought they could find some. After some conversation on that subject and other general topics, the complainant herself referred to the fact that she had taken out letters of administration on her husband's estate. Hoobler told her in reply

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Opinion of the Court.

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that he had heard of it and had come on purpose to settle it up; that his father on his death bed had said that he did not wish any litigation about his estate, and had charged him, Andrew J. Hoobler, to be sure and see to it that the complainant got her share of the estate. This latter direction from his father, Hoobler, according to the complainant's version of the interview, repeated many times. She also testifies that during portions of the interview, while they were conversing in relation to the death of the complainant's husband, both she and Hoobler were in tears.

She told him in explanation of her having taken out letters of administration, that her husband had been dead nearly two months before she knew of it; that her husband had asked her to write to him often, and that she had sent letters to him, but that they had not allowed her to hear from him, and that she thought it was about time something was done. Hoobler then expressed a doubt about her being able to get anything; that there seemed to be nothing which could be gotten hold of. She thereupon called his attention to the promissory notes her husband had at the time of their separation. He told her the notes had all been squandered, and repeated that statement over and over again, and said that whatever he paid her by way of settlement would have to come out of his own pocket. She then asked him what had become of the real property, and said she ought to have her share in that. That, he said, was so little that it would be of no benefit to her; that it would not rent for more than \$30 a year, and that she would be entitled to only one-third of that, which would be only \$10 a year. She suggested that it might be sold, but he assured her that it could not be while she lived, and this opinion was echoed by Gouty. He also stated to her as an additional reason why she had better sign said papers that his brother Fred. had said that if she did not sign them and thus compromise the matter, he would law her as long as he had a cent to law with.

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Opinion of the Court.

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She testifies that she believed that Hoobler was her friend, and believed what he told her. After these various representations, Hoobler asked her to say what she was willing to take for a relinquishment of her interest in the estate. She replied that if it was to come out of his pocket she would take \$100, and the papers were thereupon executed on those terms, with the addition that Hoobler also agreed to pay the complainant's attorney, which he afterwards did.

According to Andrew J. Hoobler's version of the interview, and he is in the main corroborated by the testimony of Gouty, nothing whatever was said about the notes having been squandered, but the complainant was told that the notes were all in existence and were at Hoobler's brother Fred's house where his father died; that he explained to her fully and truly the situation of the estate and the nature of her rights; that he also told her that his father, on his death bed, said to him that at the time of his marriage with the complainant, there was an agreement between him and the complainant that in the event of the death of either, the property of the one so dying should go to his or her children. The complainant on her part testifies that there was nothing whatever said in her conversation with Hoobler in relation to said alleged ante-nuptial contract.

The bill alleges, as the grounds for relief, that at the time said instruments were executed by which the complainant relinquished her interest in her husband's estate, she was past seventy-one years of age, very infirm and broken down with disease, and unsifted and incapacitated for transacting business; that Andrew J. Hoobler came to her and represented, in substance, that her husband's estate was wholly insolvent, and that to persist in the administration would only create costs, and that rather than have her involve herself in fruitless litigation, he would pay her \$100 out of his own pocket for a release of her apparent interest in the estate; that she being too old and infirm to go to Livingston county to look after her

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Opinion of the Court.

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interests and find out the truth in relation to the estate, and relying upon the representations so made in apparent good faith by said Hoobler, accepted his offer of \$100 and executed said papers, said Hoobler well knowing at the time that his statements and representations were false, and that said estate was in fact solvent and worth at least \$6000, and that the complainant was entitled to her homestead, her dower and her widow's award, worth in all at least \$2000. The bill further alleges, that, at the time of the execution of said papers, she was almost wholly prostrated from disease, and was sick and infirm and incapable of transacting said business, and that said Hoobler at the time knew that she was sick and infirm and incapable of understanding and comprehending the nature of the transaction, and that said Hoobler sought said time and opportunity to influence the complainant by sophistry and money, and that it was under these circumstances and these influences the complainant signed said deed and assignment and accepted said \$100 therefor.

It will be seen that the evidence in relation to the charges of fraud made by the bill is directly and sharply conflicting. The jury, before whom the witnesses appeared and testified, found that said charges were sustained, and their finding has been approved by the chancellor who rendered the decree, and we can not, from anything apparent to us from the record, say that the evidence has been misconceived or misconstrued, or that there is any such preponderance against the verdict of the jury or the decree of the court as would warrant us in setting the decree aside and ordering a rehearing. The evidence of the complainant clearly supports the decree, and the evidence for the defense merely raises a conflict, but it is a conflict where there is no such preponderance as should take the case out of the ordinary rule, that where the jury and chancellor see and hear the witnesses, their finding upon questions of fact where the evidence is merely conflicting is conclusive.

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Opinion of the Court.

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Complaint is made of the form in which the issues were made up and submitted to the jury. The issues, as submitted, were as follows:

1. "Was the deed from complainant to Andrew J. Hoobler improperly and wrongfully obtained from her, as is alleged in the bill?

2. "Was the agreement named in said deed as being made by complainant to said Andrew J. Hoobler, improperly or wrongfully obtained from her, as alleged in said bill of complaint?"

While it is manifest that these issues were not so formed as to clearly present the questions of fact which should have been submitted to the jury, it is sufficient for the purposes of this appeal to say, that it affirmatively appears from the record that the issues as submitted were agreed to by the parties. After entering into such agreement, the appellants will not be permitted to allege that the issues were improper, either in form or substance.

Complaint is made of the first instruction given to the jury at the instance of the complainant, which was as follows:

"The court instructs you that there are two allegations in the bill, either of which, if true, would authorize you to find the issues presented to you for complainant. First:—Was the complainant in such condition mentally at the time of signing the deed and contract in evidence as not to understand the nature and result of the act she was performing? Second:—If she did understand the nature and result of her acts, did Andrew J. Hoobler falsely and fraudulently represent the condition of her husband's estate to her at the time, as alleged in the bill, and did she thereby, relying on such statements, sign such deed and contract, when she would not have done so had she known the true condition of such estate? If you find that she did not understand the nature of her act when signing the deed and contract in evidence, because of her mental condition,

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Opinion of the Court.

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then you should find both of the issues submitted to you in the affirmative. If you find that she did understand the nature and result of her act when signing the deed and contract in evidence, but find she signed the same because of false representations made to her by Andrew J. Hoobler, as alleged in the bill, then you should find both of the issues submitted to you in the affirmative."

The criticism upon this instruction is, that it submits to the jury issues different from those which they were impanelled to try. This is clearly a misapprehension. It merely calls the attention of the jury to each of the two substantive grounds of relief set up in the bill and upon which it is claimed that the instruments which the bill seeks to have cancelled were improperly and wrongfully obtained. It then instructs the jury that if either of these grounds is sustained, the allegation of the bill that said instruments were improperly and wrongfully obtained is made out, and that in such case the verdict of the jury should be for the complainant on both issues. This was in no sense a substitution of new issues, but an instruction properly informing the jury as to what facts must be found to entitle the complainant to a verdict upon the issues already submitted. An instruction the precise counterpart of the foregoing was given on the part of the defendants, which, after reciting literally the issues submitted to the jury, proceeds as follows:

"And under said issues so submitted, before Mrs. Hoobler can recover, she must prove, either that she was incapable of transacting ordinary business at the time she executed the deed and agreement or release as explained in other instructions, or that she was procured to execute the deed and release by false and fraudulent representations as explained in other instructions, or that she was procured to execute the deed and release under undue influence, as explained in other instructions."

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Opinion of the Court.

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Complaint is made of various other rulings of the court in giving and refusing instructions to the jury. We could not, without unreasonably prolonging this opinion, discuss each of the several instructions criticised but are disposed to content ourselves with saying that we have carefully considered each of the points made, and are of the opinion that none of them are well taken. The law was given to the jury with substantial accuracy, and there was no material error in the rulings of the court in that respect.

Various exceptions were also taken to decisions of the court overruling objections to interrogatories put by the complainant to her witnesses. These interrogatories called for answers relating to the physical and especially the mental condition of the complainant at and about the time she executed the instruments in question, to her being of weak mind and easily influenced, and to her capability of transacting business and of understanding the nature and consequences of the business she was engaged in at the time she executed said instruments. It can not be doubted that in the main the subject matter of these interrogatories was proper, and called for evidence pertinent to the issues raised by the pleadings and submitted to the jury. Some of the questions objected to were probably improper in form if not in substance, but when taken in connection with the answers elicited and the entire scope of the evidence, we are of the opinion that no error was committed in that respect of a nature so serious as to require a reversal of the decree.

As we find no material error in the record, the decree will be affirmed.

*Decree affirmed.*

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Syllabus.

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THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY et al.

v.

MARY A. SNYDER, Admx.

*Filed at Ottawa May 16, 1889.*

1. PRACTICE—*directing what the verdict shall be.* If there is evidence on the part of the plaintiff tending to prove the issues involved, it is not proper to take the case from the jury by an instruction to find for the defendant.

2. Where a right of action fairly depends upon the effect or weight of testimony, the case is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it.

3. FELLOW-SERVANTS—*question of fact for the jury.* In an action against a railway company, to recover for the death of a conductor on the defendant's road, caused by the negligence of another servant in charge of a semaphore, the defendant asked, and the court gave, an instruction embodying the rule as to the liability of a master to one servant for an injury caused by the negligence of a fellow-servant, which was numbered 1. The defendant asked the court to submit this question: "At the time of the accident causing S.'s death, did the usual duties of S., and T., the semaphore attendant, bring them habitually together, so that they could exercise a mutual influence upon each other promotive of proper caution?" The court submitted the same, with this addition: "So as to make them co-employes in the same line of employment, as explained in defendant's instruction No. 1:" Held, no error in the modification of the question, as it did not require the jury to pass upon the law.

4. VERDICT—*general verdict, and special findings—whether inconsistent.* A special finding of a jury that the employes of one of the defendant railways, in charge of its train when it crossed the track of another road, were not guilty of negligence that materially contributed to the injury, is not inconsistent with a general verdict finding both the defendants guilty of negligence contributing to the injury, where the negligence charged and proved was, that the agent of both companies defendant failed to properly manage the semaphore and so signal as to prevent a collision, such agent not being an employe having charge of the train.

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134	913
136	647
128	656
35a	644
128	656
143	545
128	655
151	555
152	467
155	216
44a	429
45a	841
128	655
50a	471
128	655
157	604
128	655
51a	380
128	655
64a	544
128	655
70a	334
128	655
100a	511

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Brief for the Appellant.

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5. INSTRUCTION—*as to a question of fact.* Where there is proof, in an action against two railway companies, that an agent, guilty of negligence, was employed and paid by both companies, and operated a semaphore or signal in the interest or service of both companies, it is proper to refuse an instruction that such agent was not the agent of one of the companies, but was that of the other company.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. WILLIAM C. GOUDY, for the appellant the Chicago and Northwestern Railway Company:

When the whole evidence is so insufficient to support a verdict that the court would not permit one to stand, it is the duty of the court to instruct the jury, as matter of law, to find for the defendant, or to exclude all the plaintiff's evidence. *Phillips v. Dickerson*, 85 Ill. 15; *Reed v. Deerfield*, 8 Allen, 524; *Simmons v. Railroad Co.* 110 Ill. 346; *Pleasants v. Faut*, 22 Wall. 120; *Randall v. Railroad Co.* 109 U. S. 478; *Skel-lenger v. Railway Co.* 61 Iowa, 714; *Martin v. Chambers*, 84 Ill. 579; *Frazer v. Howe*, 106 id. 573; *City of Mattoon v. Fal-lin*, 113 id. 249; *Railroad Co. v. O'Conner*, 115 id. 261; *Bar-telotte v. International Bank*, 119 id. 369.

The plaintiff could not recover because Snyder and Torrence were fellow-servants. This court has held that it is a question of law as to what constitutes fellow-servants, and that the jury are to find the facts from which the court may determine that question. *Railway Co. v. Moranda*, 108 Ill. 576; *Rail-road Co. v. Morgenstern*, 106 id. 216.

Mr. E. WALKER, for the appellant the Chicago, Milwaukee and St. Paul Railway Company.

Mr. MASON B. LOOMIS, for the appellee.

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Opinion of the Court.

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Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This case is now before us for the second time. The first decision of it is reported as *C. & N. W. Ry. Co. et al. v. Snyder*, *Admx.* 117 Ill. 376. The second trial in the court below has again resulted in a verdict and judgment in favor of the plaintiff, and in an affirmance of such judgment by the Appellate Court.

The action is brought against the Chicago and Northwestern Railway Company, and the Chicago, Milwaukee and St. Paul Railway Company to recover damages for the death of John H. Snyder resulting from the collision of a train of the former company with a train of the latter company at a point where the tracks of the two companies crossed each other. The facts are settled by the judgment of the Appellate Court.

The first error assigned is the refusal of the trial court to instruct the jury to find for the defendants. There was evidence on the part of the plaintiff tending to prove the issues involved, and, therefore, it would have been improper to take the case from the jury. The first question to be determined was, whether Snyder, who was the conductor of a train on the Northwestern road travelling eastward, was exercising ordinary care in the management of his train when the accident occurred. The plaintiff introduced testimony tending to show, that the deceased stopped his train, before coming to the crossing, at the distance therefrom required by the statute and the rules of the company, and that he kept a proper look-out for the customary signals. Defendants introduced testimony tending to show, that he did not stop at the proper stopping-place, and did not keep the requisite look out. These were matters for the jury to decide.

The next question to be determined was, whether Torrence, who was in charge of the Semaphore as the paid agent and employee of *both* of the defendant companies, was guilty of negligence in failing to give Snyder such a signal, as it was

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Opinion of the Court.

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necessary for him to have, in order to move his train safely over the crossing. When the semaphore was so managed as to throw a green light upon the track, a waiting train had the right to advance, while the red light on the track was a signal to such a train not to move. The plaintiff introduced evidence tending to show, that Torrence threw the wrong light at the wrong time, so as to induce Snyder to go forward when he should have remained stationary, and that this careless management of the signal on the part of Torrence was the cause of the collision. The defendants offered testimony for the purpose of negativing this theory. It was the province of the jury to pass upon the question.

The Supreme Court of the United States holds as follows : "Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." (*Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Randall v. B. & O. R. R. Co.* 109 id. 478; *Goodlett v. Louisville R. R.* 122 id. 391; *Kane v. Northern Central R'lw'y Co.* 128 id. 91). In *Blanchard v. L. S. & M. S. R'y Co.* 126 Ill. 416, this court sustained the trial court in instructing the jury to find for the defendant, because the testimony on the part of the plaintiff in that case was of the conclusive character mentioned in the above quotation, it having been made to appear, that, when plaintiff's intestate was killed, he was walking along upon the railroad track at a place where there was no regular crossing—an act, which had already been held to be proof of the want of that ordinary care, always necessary to be shown, in order to secure a recovery in an action of this kind. No such failure to establish a cause of action is presented by the record now before us. (*Chicago West Division Ry. Co. v. Mills*, 105 Ill. 63.)

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Opinion of the Court.

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The jury found specially, in answer to a question prepared by one of the defendants, that the employees of the C. M. & St. P. Ry. Co., who were in charge of the latter company's train when it crossed the track of the C. & N. W. Ry. Co. were not guilty of "negligence that materially contributed to the injury complained of." This finding is not inconsistent with the general verdict. By the latter, the defendants were found guilty by reason of the negligence of Torrence, who was in the joint employment of the two companies, in failing to properly manage the semaphore. Torrence was not upon either of the trains which collided. He was in the signal station, which was ninety feet west of the crossing where the collision took place. He may have been guilty of negligence, and yet those, who were in charge of the train crossing the tracks, may have been entirely innocent of any want of care.

We can not stop to comment upon all the special findings in this record. After a careful examination of them we see no such inconsistency in them with the general verdict, as would justify us in again reversing this cause. We can but repeat the language heretofore made use of in *C. & A. R. R. Co. v. Murray*, 71 id. 601: "We have no doubt the deliberations of the jury are, in many cases, embarrassed by voluminous instructions, drawn by ingenious counsel, calling for special findings, and the practice ought not to be encouraged."

The second instruction, shown by the present record to have been given for the plaintiff, is the same as the third instruction commented upon in our former opinion in *C. & N. W. Ry. Co. et al. v. Snyder, supra*. The defect in it, which we there held to be fatal, was obviated by a proper correction before it was given upon the second trial. As it now reads, it submits to the jury the question, whether those engaged with Snyder in the management of his train, as well as Snyder himself, were exercising due care when the accident happened. The only objections now made to the instruction are those, which we held to be insufficient, when the case was here before.

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Opinion of the Court.

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The trial court refused to give an instruction asked by the defendant, the C. M. & St. P. Ry. Co., which holds substantially that, under the circumstances attending the collision of the trains, Torrence was the agent only of the C. & N. W. Ry. Co., and not of the other defendant. There was proof tending to show, that he was employed by both companies, paid by both companies, and operated the semaphore in the interest of both companies. The tracks of the Northwestern road ran east and west, and those of the St. Paul road crossed them running from the northwest to the southeast. Just before the collision took place, there was a train on the N. W. road, east of the semaphore and bound for the west ; there was a train on the St. P. road, also east of the semaphore and bound for the northwest ; there was still another train west of the semaphore, and bound for the east ; it was this latter train, of which the deceased was the conductor. The testimony tended to prove that, at the time of the accident, Torrence was engaged in directing the movements of all three of these trains by the turning of the semaphore. If the jury should find that he was so engaged, they would find that he was in the service of both defendants when Snyder was killed. To have given an instruction, which would have led them to believe that he was the servant of one defendant only at that time, would not have been based upon the evidence, and, therefore, the refusal to give it was not erroneous.

At the request of the defendant, the *C. & N. W. Ry. Co.*, the court below gave the jury an instruction embodying the rule, heretofore laid down by this court, which requires, "that the servants of the same master, to be co-employees so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business in the same line of employment, or that their usual duties shall bring them habitually together, so that they may exercise a mutual influence upon each other promotive of proper

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Opinion of the Court.

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caution." (*Rolling Mill Co. v. Johnson*, 114 Ill. 57, and *C. & N. W. Ry. Co. et al. v. Snyder, supra*). The instruction so given is marked defendant's instruction No. 1. The jury returned a negative answer to the following question: "At the time of the accident, causing Snyder's death, did the usual duties of said Snyder and Torrence, the semaphore attendant, bring them habitually together so that they could exercise a mutual influence upon each other promotive of proper caution, *so as to make them co-employees in the same line of employment, as explained in defendant's instruction No. 1?*"

The question as originally drawn by defendant's counsel did not contain the last clause, which is in italics. The italicized clause was added to the question by the court, and such modification of the question by the court is complained of as error. We cannot see that the defendant company was prejudiced by thus referring the jury to its own instruction prepared by its own counsel. They were not required by the modification to pass upon the law. They were merely told to answer the question of fact, propounded to them, in accordance with the principles of law laid down in the instruction.

We find no error in the record. The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*



# INDEX.

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## ABATEMENT.

### PLEA IN ABATEMENT.

1. *In attachment—requisites of the plea.* An affidavit for an attachment set out as grounds therefor, that the defendant "conceals himself or stands in defiance of an officer, so that process can not be served upon him, and has, within two years last past, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder and delay his creditors, and has, within two years last past, fraudulently concealed or disposed of his property so as to hinder and delay his creditors, and is about fraudulently to conceal, assign or otherwise dispose of his property or effects, so as to hinder or delay his creditors." The defendant pleaded in abatement "that he did not conceal himself and did not stand in defiance of an officer, so that process could not be served upon him; that he has not, within two years last past, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder and delay his creditors; has not, within two years last past, fraudulently concealed or disposed of his property so as to hinder and delay his creditors, and was not about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors." *Held*, on demur to the plea, that it was bad, in failing to deny that the debtor had, within two years before the commencement of the suit, fraudulently disposed of his property. *McFarland v. Claypool*, 397.

## ACTIONS.

### MISTAKE IN TELEGRAPHIC DISPATCH.

*Rights and remedies of the person receiving the dispatch.* See TELEGRAPHS, 2, 3, 4.

## ADMINISTRATION OF ESTATES.

### JURISDICTION IN CHANCERY.

1. *Powers of the county court—how far exclusive.* A court of chancery may, in the exercise of its general jurisdiction, take upon itself the administration of an estate. But this will be done only in extra-

**ADMINISTRATION OF ESTATES.****JURISDICTION IN CHANCERY. *Continued.***

ordinary cases, and when it does, it will take the whole administration, and not merely a part of it. The fact that the administrator has, through negligence or fraud, failed to find and collect assets in the hands of surviving partners of the intestate, is not a sufficient ground for the interposition of a court of equity. In such a case, the remedy is within the powers of the county court. *Winslow v. Le-land, Admr. et al.* 304.

2. The county court has ample power to compel an administrator to proceed properly and faithfully in the discharge of his duties. If he makes mistakes, it has power to correct them. If he has been guilty of fraud, or has wasted the estate, or has shown himself incompetent or an improper person to conduct the administration, the court has power to call him to account, or to remove him and appoint another and suitable person in his place. *Ibid.* 304.

3. The remedy by which the creditors of an intestate may subject the personal estate of their deceased debtor to the payment of their claims, is by due course of administration. As to all personal assets which are legally within the reach of the administrator, and upon which the creditor has obtained no lien during the lifetime of his debtor, this remedy is exclusive. All personal assets as to which the intestate was himself in a position to assert title at the time of his decease, pass to the administrator, and it is through him alone that the creditors must seek to have them subjected to the payment of their debts. *Ibid.* 304.

**ABANDONMENT OR RELEASE OF CLAIM.**

4. A covenant or agreement by a creditor of an estate with the widow and heirs, that all proceedings for the collection of his debt through the instrumentality of the administration shall be abandoned, that the estate may be finally settled and final distribution made, wholly discharged of his claim, and releasing and relinquishing to the widow and heirs of the intestate any claim he may have to share in such distribution, is in effect a complete abandonment and release of all legal claim to have his debt satisfied out of any personal estate which the administrator has reduced to possession, or to which he is entitled as administrator. *Ibid.* 304.

5. In such case, it can not avail the creditor that a reservation was made in the contract of release, of the right, by other proceedings then pending or thereafter to be instituted, to enforce the collection of his claim out of that of the intestate in the assets of certain firms of which the intestate was a member at his death. That interest could be reached by the creditor by due course of administration, and not otherwise, and therefore such reservation is nugatory. *Ibid.* 304.

**ADMINISTRATION OF ESTATES. *Continued.*****ASSIGNABLE INTEREST OF DISTRIBUTEEs.**

6. On the death of a partner, all rights and causes of action growing out of his dealings with the firms of which he was a member, and the right to an accounting with the surviving members of such firms, are by law vested in his administrator, and not in his widow and children, and they can not transfer to a third person the right to call on such surviving members for an accounting. *Winslow v. Leland, Admr. et al.* 304.

7. The widow and heirs of an intestate have an assignable interest in their distributive share of the assets of the estate after the payment of debts; but that interest is wholly distinct from an interest in specific chattels upon which no administration has been had. As to the latter, they have no interest susceptible of assignment, the entire ownership, for all the purposes of administration, being vested in the administrator. *Ibid.* 304.

**ADVANCEMENT.****CAN NOT REST IN PAROL.**

1. *Since the act of 1872.* An advancement of a parent, in his lifetime, to his child, can not, since the act of 1872, relating to the descent of property, be shown by the parol declarations of the parent or the parol admissions of the child, that he or she had received his or her share. *Wilkinson et al. v. Thomas et al.* 363.

2. Under this statute, an advancement can not be created by parol declarations or statements. On the other hand, in order to create a valid advancement, the gift or grant must be expressed in writing as an advancement, or charged in writing by the intestate or acknowledged in writing by the child or other descendant. *Ibid.* 363.

3. In 1869, a father, for the expressed consideration of love and affection and one dollar, conveyed a lot of ground to his daughter, of the value of \$1000. In 1876 he conveyed to each of two of his sons eighty acres of land in Iowa, for the expressed consideration of love and affection and one dollar. In 1886 he executed a will, which was not probated, on account of a subsequent marriage, in and by which he devised to his daughter five dollars, reciting: "She having heretofore received the sum of \$1000 in real estate. \* \* \* My several sons all had land and other property to the value of at least \$2000 each :" Held, that the words used in the will were not sufficient to afford evidence of an advancement to the daughter and sons. *Ibid.* 363.

**AFFIRMANCE OF DECREE.****CONCLUSIVE AS TO ERROR.**

1. Where a decree is affirmed by the Supreme Court, it must be regarded as free from any error. *Gould et al. v. Sternberg,* 510.

**AGENCY.****AGENT DEALING WITH PRINCIPAL.**

1. *Or with the subject matter of his agency.* An agent appointed to sell property can not, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal freely given, after full knowledge of every matter known to the agent which might affect the interests of the principal. *Tyler et al. v. Sanborn et al.* 136.

2. It is of no consequence in such a case that no fraud was actually intended, or that no advantage was, in fact, derived from the transaction, by the agent. The rule is not merely remedial of wrong actually committed, but is intended to be preventive of wrong. *Ibid.* 136.

3. An agent may undoubtedly buy of his principal and have an interest in the sale of property belonging to his principal, but in such case the burden is upon the agent to show that the principal had knowledge, not only of the fact that the agent was buying or interested, but also of every material fact known to the agent which might affect the principal, and that having such knowledge, he freely consented to the transaction. This rule is equally applicable to cases where the agent is empowered to sell at a stated price, as when his authority is to sell generally. *Ibid.* 136.

4. An agent was appointed by non-resident owners of real estate to look after the same and collect rents, and procure offers of purchase, to be submitted to his principals. He reported an offer of \$1000 by B. for the property. The offer was accepted and a deed sent to the agent for delivery on payment of that sum. B. declined finally to make the purchase, when the wife of the agent agreed to take the property at the price named, and B. made her a deed, and she paid the price to her husband, and the two deeds were recorded, placing the legal title in the wife. This was done without the knowledge of the principals, and no fraud in fact was intended: *Held*, that the transaction amounted to a sale by the agent to his wife, and was fraudulent in law, and that the principals, upon learning the facts, had the right to have the sale and the deeds set aside. *Ibid.* 136.

5. Where the owners of real property sent to their agent a deed, to be delivered, on payment of \$1000, to one who had made an offer to purchase at that price, it was held, that the agent had no authority to use the grantee in such deed as a mere trustee to convey the title to the agent, or to some one else, so that the agent might have an interest in the property. The law will not allow an agent to occupy a position in which he may be tempted to betray his trust. *Ibid.* 136.

**ALLEGATIONS AND PROOFS.** See PLEADING AND EVIDENCE, 1, 2.

**AMENDMENTS.**

**AMENDMENT OF RECORD.**

1. *In the Supreme Court—at a subsequent term.* Amendments of the record in affirmance of a judgment, when there is anything by which to amend, may, upon proper notice, be made at a term subsequent to that at which final judgment was rendered; but amendments not in affirmance, but in derogation of the judgment, are not allowed at a term subsequent to that at which final judgment is rendered. *Fielden et al. v. The People*, 595.

2. The record of this court affirming a judgment of conviction in a capital case, showed the presence of the prisoners in court on the rendition of the judgment of affirmance. At a subsequent term, the prisoners, by their counsel, entered a motion in this court to amend the record so as to omit the recital of the presence of the prisoners in court, which motion was overruled, as was also a motion for leave to amend the original motion, on the ground the proposed amendment was in derogation of the judgment, and came too late. But the court do not concede that the amendment, if made, could affect the validity of the judgment. *Ibid.* 595.

**AMENDMENT OF DECLARATION.**

3. *In ejectment.* The circuit court has authority, under section 23 of the Practice act, to allow the plaintiff in ejectment to amend the declaration by changing the parties and correcting the description of the land sued for. *Strean et al. v. Lloyd et al.* 493.

**AMENDING A PLEADING.**

4. *Proposed amendment to be submitted for inspection.* See PRATICE, 4.

**ANNUITY.** See WILLS, 20 to 23.

**APPEALS AND WRITS OF ERROR.**

**FROM APPELLATE COURT.**

1. *Whether an appeal will lie.* When a case determined in the Appellate Court does not involve either a freehold, a franchise or the validity of a statute, and the record contains no certificate of the judges of that court that it involves questions of law of such importance, on account of principal or collateral interests, that it should be passed upon by this court, and the amount involved is less than \$1000, no appeal will lie from the judgment of the Appellate Court. *Moore, Admr. v. Sweeney, Admr.* 204.

2. The administrator of a deceased widow had appraisers appointed to appraise her deceased husband's estate, who appraised the property left by the husband at \$32.75, and fixed the widow's award at \$700. The administrator of the widow's estate selected the

**APPEALS AND WRITS OF ERROR.****FROM APPELLATE COURT. *Continued.***

personal property, and elected to take the residue (\$667.25) in money, which was allowed against the husband's estate as a second class claim. On appeal to the circuit court this claim was disallowed, and this judgment was affirmed by the Appellate Court: *Held*, that as the amount involved was less than \$1000, and no certificate of importance was given, no appeal lay from the judgment of the Appellate Court. *Moore, Admr. v. Sweeney, Admr.* 204.

**FINAL JUDGMENT.**

3. *In Appellate Court.* A judgment of the Appellate Court reversing and remanding a cause is not a final judgment, and no appeal lies from such judgment to this court. *Jones v. Fortune et al.* 518.

**WHAT QUESTIONS TO BE CONSIDERED.**

4. *Conclusiveness of affirmance by Appellate Court.* Where an action is tried by the court below without a jury, and no exceptions are taken as to the admissibility of evidence, and no written propositions of law are submitted to the court, and the Appellate Court affirms the judgment, that judgment will be conclusive, and on an appeal to this court there will be nothing for it to consider. *McDonald v. Allen et al.* 521.

5. *On affirmation by the Appellate Court—where the only exception taken was to the rendering of the judgment below.* Where a common law case is tried by the judge, without a jury, and no question is made as to the ruling on the admission or exclusion of evidence, and no written propositions of law are submitted to the court, and the only exception taken is for the rendition of judgment, and the Appellate Court affirms such judgment, the record, on appeal from the Appellate Court, will not present any question for this court, and all it can do will be to affirm the judgment of the Appellate Court. *Myers v. Union Nat. Bank*, 478.

6. *Absence of objections or exceptions.* The record in an action of ejectment, which was tried by the court alone, showed no exception to the judgment complained of, and the bill of exceptions mentioned no motion for a new trial, and was silent as to objections or exceptions to the finding of the trial court. The errors assigned in the record were, that the court erred in its finding of facts and entering the judgment, etc.: *Held*, that on this state of the record the errors assigned raised no question this court could consider. *Gage v. Goudy*, 566.

7. *Claim of homestead, in respect to which there was no evidence.* In an action of ejectment to recover land sold under a decree of foreclosure, no proof was offered at the trial tending to show that the premises when sold, or when the mortgage was given, were occupied by the mortgagors, or either of them, as a homestead, nor

**APPEALS AND WRITS OF ERROR.****WHAT QUESTIONS TO BE CONSIDERED. *Continued.***

was it shown they were so occupied at any time: *Held*, on error, that the question of a homestead right, to defeat the sale, was not presented for adjudication, and could not be considered. *Bozarth et al. v. Largent*, 95.

**JUDGMENT OR DECREE PRO FORMA.****8. Appellate Court—duty to hear and decide cases on the merits.**

Where a case is taken to the Appellate Court, it is the duty of that court to hear and decide it on its own judgment, and file a written opinion, briefly giving its reasons for its decision. So where the judgment or decree of the trial court is affirmed by the Appellate Court, *pro forma*, on the motion of the appellant, under a stipulation of the parties that the decree or judgment shall be so affirmed, the appellant, on an appeal to this court, can not assign for error the judgment of the Appellate Court so entered at his request. *Smith, Receiver, v. Kimball*, 583.

**REVIEWING THE FACTS.**

**9. In ejectment.** On an appeal in an action of ejectment, this court must review questions of fact as well as of law, when properly presented. *Strean et al. v. Lloyd et al.* 493.

**FINDING OF FACTS.**

**10. By Appellate Court—and recital thereof in final judgment—how far conclusive.** If the Appellate Court refuses to remand the cause for the reason that the evidence does not tend to prove the cause of action alleged, it must "either wholly or in part find the facts concerning the matter in controversy different from the finding of the trial court;" and in that event it is required to recite in its final order, judgment or decree, the facts as found. *Jones v. Fortune et al.* 518.

**11.** The facts found by the Appellate Court, when recited in its final judgment, are not subject to controversy in this court; but this court may inquire whether the law has been correctly applied to them, and thus determine whether the refusal to remand was proper. *Ibid.* 518.

**IN SUIT AGAINST THE AUDITOR.**

**12. Directly from the trial court.** In a suit by a foreign insurance company against the Auditor of Public Accounts, to recover back a license fee paid the latter under protest by the former, an appeal lies directly from the judgment of the trial court to this court, for the reason that the State is interested in the suit. *Germania Ins. Co. v. Swigert, Auditor*, 237.

**AS TO AMOUNT INVOLVED.**

**13. Absence of certificate of importance.** Where the amount involved, on a bill and cross-bill to foreclose certain mortgages, is

**APPEALS AND WRITS OF ERROR.****AS TO AMOUNT INVOLVED. *Continued.***

less than \$1000, the judgment of the Appellate Court in affirming the decree of the trial court is final, in the absence of a certificate of importance, and a writ of error to the Appellate Court will be dismissed. *Jordan et al. v. Moore et al.* 56.

**WHETHER A FRANCHISE INVOLVED.**

14. On an information in the nature of a *quo warranto*, against commissioners of highways assuming to act as drainage commissioners of a certain drainage district, on the ground that such district has not been legally organized, a franchise is involved, and an appeal from the judgment of the trial court lies directly to this court, and not to the Appellate Court. *The People et al. v. O'Hair et al.* 20.

**WHETHER A FREEHOLD INVOLVED.**

15. *What is meant by the word "freehold."* The word "freehold," as used in the statute relating to appeals and writs of error, is used in the sense as defined by the common law. It does not include a mere right to do that which in equity will entitle a party to a freehold. *Kirchoff v. Union Mutual Life Ins. Co.* 199.

16. *On bill to redeem.* On a bill seeking to have a deed for land absolute on its face declared a mortgage, and a right of redemption therefrom allowed, no freehold is involved, and hence no appeal lies from the decree therein directly to this court. *Ibid.* 199.

17. The mere fact that a complainant prays that the defendant be decreed, among other things, to convey certain real estate to the former, does not determine that a freehold is involved. That can be determined only by the allegations of the bill showing what the complainant is entitled to have decreed. *Ibid.* 199.

18. A bill seeking the specific performance of an agreement of an insurance company to allow the mortgagor, after foreclosure and a conveyance of his equity of redemption in discharge of the mortgage debt, to redeem a part of the premises at its appraised value, in ten equal annual installments, but which fails to show any agreement on the part of the company to reconvey before full payment of the redemption money, involves no freehold. The only decree the complainant could have, if any, would be that he be allowed to redeem, and before redemption he would not be entitled to a deed, even in equity. *Ibid.* 199.

**OF THE JUDGMENT TO BE ENTERED.**

19. *By Appellate Court—whether reversal and remandment—or such judgment as the trial court should have given.* It is competent for the trial court to exclude the plaintiff's evidence from the jury, where it has no legitimate tendency to establish the cause of action alleged; and the Appellate Court is authorized, on appeal, to do

**APPEALS AND WRITS OF ERROR.****OF THE JUDGMENT TO BE ENTERED. *Continued.***

what it shall hold the trial court should have done in this respect upon the trial. *Jones v. Fortune et al.* 518.

20. If the Appellate Court reverses the judgment of the trial court for error in its rulings of law, it must remand the cause for a new trial, unless it shall find that the evidence does not tend to prove the cause of action alleged, for otherwise it will deprive the plaintiff of the right to a trial by jury. *Ibid.* 518.

**APPRAISEMENT.**

**AS DISTINGUISHED FROM ARBITRATION.** See **ARBITRATION AND AWARD**, 1.

**APPURTE NANCE.** See **CONVEYANCES**, 6, 7.**ARBITRATION AND AWARD.****WHETHER SO CONSIDERED.**

1. *Action of appraisers of improvements, under a lease—notice to the parties.* Where a lease for a term of years provides that at the end of the term each party shall select an appraiser to value the permanent improvements put upon the premises, and in case they can not agree, the appraisers thus chosen shall select a third, and that the lessor shall pay the lessee the amount of such appraisal by any two of the appraisers, the action of the appraisers under such appointment is not an arbitration and award, so as to require notice to the parties of the time and place of the appraisers' meeting and action. In such case no statement of the parties or evidence is contemplated. The appraisers are required to examine the improvements, and act on their own judgment. *Pearson v. Sander-son*, 88.

**ASSIGNMENT.****ASSIGNMENT OF A JUDGMENT.**

1. *Subject to what defenses.* Judgments and decrees are not commercial paper, and assignees of such securities take them affected with all equities and defenses which might have been set up against them in the hands of the assignor. After a contract for the discharge of a judgment, and while such contract is in process of execution, the owner thereof can not, by an assignment of the same, divest or defeat the right of the debtor to a discharge under his contract, and on performance by the debtor the judgment will be satisfied as to him. *Winslow v. Leland, Admr. et al.* 304.

2. *Whether a satisfaction—the circumstances considered.* Where judgments against two partners are taken up by a son of one of

**ASSIGNMENT. ASSIGNMENT OF A JUDGMENT. *Continued.***

them, the fact that the son, as assignee thereof, claims to have the other partner charged with his proportionate share of the money actually paid for the transfer of the judgments, instead of the full amount due thereon, is a circumstance tending strongly to show that the judgments were taken up in the interest and for the benefit of the father. *Winslow v. Leland, Admr. et al.* 304.

3. And where the son purchases the judgments and takes an assignment thereof, if, in the subsequent adjustment of accounts between him and his father the former receives credit from the latter for all the moneys expended by him in their purchase, his interest in the judgments will be precisely the same as though the purchases had been originally made by his father with his own money and for his own benefit, and neither the son nor his assignee can collect such judgments of the father, or from his estate. *Ibid.* 304.

4. In this case, a son of one of two partners, after the purchase of certain judgments against the partners, agreed with the other partner to purchase his interest in the assets of the firm, and to pay him a price to be fixed by arbitrators, such partner to be charged with his share of the firm liabilities in fixing the price to be paid, and the son further agreed to assume the partner's share of such liabilities, and to save him harmless therefrom. It was held, that the agreement to keep such partner harmless from his share of the firm liabilities, including the judgments so held by the son, even if bought with his own money, operated between them as a satisfaction and discharge of the judgments, and being a discharge of one partner, it was equally so as to the other partner or joint debtor. *Ibid.* 304.

5. If the assignee of a judgment against two persons agrees with one of them to save and keep him harmless from liability thereon, this will operate as a satisfaction of the judgment as to both debtors, and neither the holder of such judgment nor his subsequent assignee will, in equity, be allowed to enforce the collection of the same, and such judgment can not form the basis of a creditor's bill as against the estate of the other joint debtor. The satisfaction of a judgment as to one joint debtor is a satisfaction as to both. *Ibid.* 304.

**DISTRIBUTEES OF AN ESTATE.**

6. *Assignability of their interests.* See ADMINISTRATION OF ESTATES, 6, 7.

**ASSIGNMENT OF ERROR.** See PRACTICE IN THE SUPREME COURT, 1 to 5.

**ASSIGNMENT FOR THE BENEFIT OF CREDITORS.** See INSOLVENT DEBTORS, 1, 2.

**ATTACHING CREDITOR.**

**UNRECORDED DEED.** See **UNRECORDED DEED, 1.**

**ATTACHMENT.**

**PLEA IN ABATEMENT.**

*In attachment—requisites of the plea.* See **ABATEMENT, 1.**

**ATTORNEY AT LAW.**

**CONTRACT OF EMPLOYMENT.**

1. *In what court.* A party wrote a letter to his attorneys, offering to give them \$500 fees for attending to a case in the *Supreme Court*. The case had to go to the Appellate Court, and preparation was being made to take the case there. The whole correspondence between the attorneys and client showed that the services contracted for were services in the *Appellate Court*: *Held*, that the court below was justified in finding that the special contract related to the Appellate and not the Supreme Court. *Sanders v. Seelye et al.* 631.

**ATTORNEY'S LIEN.**

2. *Generally.* Attorneys' liens are classed as general (or retaining) liens, and charging (or special) liens. The first attaches to all papers, documents, etc., which the attorney receives professionally; the second only upon that which is recovered through his professional services. This court has held that the latter of these liens does not exist in this State; but the court now holds, that in a proper case an attorney may, in this State, maintain a general or retaining lien. *Ibid.* 631.

3. This retaining lien exists on all papers or documents of the client placed in the attorney's hands in his professional character or in the course of his professional employment, and it makes no difference what the purpose may have been in placing them in the attorney's hands. *Ibid.* 631.

4. *Lien in favor of different firms.* Where a client knows that an attorney and a firm of attorneys are acting together as his attorneys in a case, and he delivers bonds to either one of them, to be used for his benefit in the litigation, the lien will attach on the bonds for the benefit of them all, for any balance due by him to either firm as fees in the case. *Ibid.* 631.

5. *Rule on attorney to surrender papers, etc.* If an attorney does not receive bonds of his client in his professional capacity, but only as a mere custodian, the court has no authority to make an order in some other suit requiring the attorney to show cause why he should not surrender them. The fact that the client files his petition in a suit he has had with others, for a rule on his attorney to surrender and deliver up bonds placed in his hands, is incon-

**ATTORNEY AT LAW. ATTORNEY'S LIEN. *Continued.***

sistent with the contention that the holder did not receive them professionally, to be used in such suit. *Sanders v. Seelye et al.* 631.

**SOLICITOR'S FEES.**

6. *On foreclosure of mortgage.* See MORTGAGES AND DEEDS OF TRUST, 7.

**OF HIS AUTHORITY.**

7. *To institute and prosecute an action of ejectment.* See EJECTMENT, 3, 4.

**BILL TO QUIET TITLE.** See CHANCERY, 12 to 16.**BOND FOR COSTS.** See COSTS, 3.**BUILDING ASSOCIATIONS.****ACT OF 1872.**

1. *Constitutionality—special law regulating interest.* The 10th section of the Building Association act of 1872 is not in conflict with the provisions of section 22 of article 4 of the constitution, which prohibits the General Assembly from passing any local or special laws regulating interest on money. *Winget et al. v. Quincy Building and Homestead Association*, 67.

**REGULATIONS IN RESPECT TO LOANS.**

2. *Validity.* Rules of a building association organized under the act of 1872, that no loans shall be made except to members; that loans shall be put up at auction, and struck off to the members bidding the highest premium; that every share of stock shall be subject to a lien for the payment of unpaid installments and other charges incurred thereon; and that no stockholder shall withdraw from the association whose stock is held in pledge for security, are authorized by the statute, and are therefore legal and valid. *Ibid.* 67.

3. So a by-law providing that when the shares of stock of any series upon which a loan should be granted should reach the matured value of \$100 each, the value of the stock should be credited to the account of the borrowing member, is valid, and warranted by the act. By this mode the loan is satisfied and discharged, and the stock so credited is cancelled, and reverts to the association. *Ibid.* 67.

**FRAUDULENT REPRESENTATIONS.**

4. *To induce members to take a loan.* A building association, by its circulars, set out the advantages of its financial scheme to men of small income. The representations were mostly laudatory, and in many respects the expression of opinion, but none of them, as to any material fact, were shown to be untrue. The party seeking to rescind his contractual relation with the association, on the ground

**BUILDING ASSOCIATIONS.****FRAUDULENT REPRESENTATIONS. *Continued.***

that he was misled, and thereby defrauded, by becoming a member, had a copy of the charter and by-laws of the association, in which the rights and obligations of members, etc., were fully stated. His failure to realize the contemplated benefits represented was owing to his own imprudence and neglect: *Held*, not such a fraud as to justify a rescission of the contract with the association. *Winget et al. v. Quincy Building and Homestead Association*, 67.

**CAPIAS AD SATISFACIENDUM.****IMPRISONMENT THEREUNDER.**

*Of a second imprisonment for the same cause.* See **IMPRISONMENT**, 1.

**CHANCERY.****RELIEF UNDER GENERAL PRAYER.**

1. A bill to foreclose a mortgage before due, by its terms, averred the failure of the mortgagor to pay the taxes then due on the land, as one of the grounds for electing to hold the whole debt due. The bill set out the mortgage as a part thereof, and it showed a right to declare the whole debt due for a failure to pay interest, or taxes on the premises: *Held*, that this was sufficient, under the general prayer for relief, to authorize a decree for the taxes paid by the mortgagee *pendente lite*, to protect the title to the mortgaged premises. *Brown et al. v. Miner et al.* 148.

2. So where a mortgage provides that in case of foreclosure, and sale of the mortgaged premises, the mortgagee shall be paid out of the proceeds of the sale the expense of advertising, etc., together with moneys advanced for taxes, assessments and other liens, etc., and the mortgagee pays such taxes subsequently to the filing of his bill to foreclose, in which the duty of the mortgagor to pay the taxes, and his failure to do so, are alleged, the complainant may be allowed, by decree, the amount of such advance, under the general prayer for relief, without filing a supplemental bill. *Ibid.* 148.

**SUPPLEMENTAL BILL.**

3. *Whether a proper basis for it.* Where a supplemental bill is filed setting up a supposed interest acquired *pendente lite*, and it appears from such bill that the assignment relied on passed no interest to the complainant capable of being asserted either at law or in equity, it will be subject to demurrer. In such case, the complainant will have no newly acquired interest which can be the basis of such a bill. *Winslow v. Leland, Admr. et al.* 304.

**NEWLY DISCOVERED MATTER.**

4. *How availed of—after reversal.* Where, after the cause has been submitted to the court on a bill to set aside a conveyance made in

**CHANCERY. NEWLY DISCOVERED EVIDENCE. *Continued.***

fraud of creditors, and confirm the title to land in the complainant, as purchaser of the same under execution, the decree to be entered of the term the cause is submitted, the judgment under which the sale was made is reversed, the defendant may, on application at the next term, obtain a rehearing if he is entitled to the benefit of the reversal; or he may file a bill in the nature of a bill of review, upon newly discovered matter, and thus obtain relief. *Gould et al. v. Sternberg*, 510.

**CREDITOR'S BILL.**

5. *Prerequisites—and herein, in case of the death of the judgment debtor.* A money decree in a court of equity stands upon the same footing as a judgment at law, in respect to a creditor's bill. An execution thereon must be issued, and returned no property found. *Winslow v. Leland, Admr. et al.* 304.

6. It is a general rule, subject to very few exceptions, that before a bill can be filed to reach equitable assets, the creditor must first recover a judgment at law,—or what, in a proper case, would be its equivalent, a money decree in equity,—and have an execution issued, and returned unsatisfied. *Ibid.* 304.

7. By the death of a judgment debtor, remedies which might have been pursued in his lifetime are extinguished, and a new class of legal rights and remedies is created. His personal estate is no longer liable to sale on execution, but creditors are given the right, upon exhibiting and establishing their claims in the county court, to share in the distribution of his estate. *Ibid.* 304.

8. Not only is it true that when a debtor dies the law gives new legal remedies against the representatives, but the rule is imperative, that to entitle a creditor to share in the distribution of his estate, those remedies must be pursued. The creditor must exhibit and prove his claim in the court before he can be entitled to payment. In this respect judgment creditors, except so far as their judgments are liens on real estate, and simple contract creditors, stand upon the same footing. *Ibid.* 304.

9. The mere fact that a creditor has exhausted his legal remedies against his debtor while living, does not furnish a sufficient ground for proceeding, by creditor's bill, to reach personal estate while the administration of the estate of the debtor is in progress, especially when no fraud is charged against the intestate, and the only scope of the bill is to seek a remedy against the fraud or failure of duty of the administrator himself, and to reach property which the administrator is entitled to, but which he has failed to get into his possession. *Ibid.* 304.

10. By the statute, claims against estates of deceased persons are to be classified, and some are to be paid in full and others *pro rata*.

**CHANCERY. CREDITOR'S BILL. *Continued.***

and a claimant can not avoid this statute by resorting to equity. A court of equity will not ordinarily assume jurisdiction until the claimant shall have exhibited his claim and had it allowed in the county court, and then, if any special reasons that may be deemed sufficient can be assigned why that court can not afford the requisite relief, equity will assist him, but not otherwise. *Winslow v. Leland, Admr. et al.* 304.

11. *As to judgment in United States Court.* A judgment in the United States Court, that being a court of another jurisdiction, can not be made the basis of a creditor's bill in a State court. *Ibid.* 304.

**BILL TO QUIET TITLE.**

12. *Jurisdiction in chancery.* Where one has already sufficiently established his right, at law, to land, and yet is in danger of being harassed by fresh attempts to interfere with such right, a court of equity will grant a perpetual injunction to quiet his possession and protect him against the annoyance of future suits. Although it must appear that the right has already been satisfactorily established at law before equity will interfere, it is not material what number of trials have taken place,—whether two, only, or more. *Pratt et al. v. Kendig et al.* 293.

13. But it can make no difference whether the proceeding in which the right has been established is an action at law or a suit in chancery, if the latter is one of such a character as to authorize a court of equity to adjudicate upon the legal title. *Ibid.* 293.

14. The jurisdiction of courts of equity of bills of peace, depends upon other considerations than the question of possession. It depends upon the fact that the complainant has several times satisfactorily established his title. *Ibid.* 293.

15. The owner of a tract of land laid out into lots, in three prior suits established his title as against the defendant, and was in the possession of the same, by himself and tenants. As the tenant on a certain lot was leaving the same, the defendant, by fraud and deception, obtained the keys of the building, and wrongfully entered the same. The owner, through his agent, entered without legal process, and re-possessed himself, and filed his bill to quiet his possession, and to enjoin the prosecution of suits of trespass and forcible entry brought by the defendant, and to set aside a deed made by the defendant, as a cloud on the title: *Held*, that the jurisdiction of the court to entertain the bill, so far as the lot was concerned, did not depend on the manner in which complainant re-possessed himself, but upon broader grounds. If the suit had been merely to remove a cloud, and had embraced the one lot only, the nature and character of complainant's possession might have been important, as affecting his right to maintain the bill. *Ibid.* 293.

**CHANCERY. BILL TO QUIET TITLE. *Continued.***

16. *Of the decree—on bill to quiet title.* On bill to quiet title to real estate, and to perpetually enjoin the defendant from bringing or prosecuting further suits, and to set aside a deed made by the defendant as a cloud on the title to a part of the land, it is proper for the court, by its decree, to quiet the complainant's title as against the deed from the defendant, but it will not be proper to require the grantee in such deed to convey to the complainant. *Pratt et al. v. Kendig et al.* 293.

**REMOVING CLOUD UPON TITLE.**

17. *Void tax certificates.* Where tax certificates are issued upon a void sale for taxes, a court of equity will set them aside as clouds on the title, at the suit of the owner, although the time of redemption from the sale has not expired, the owner being in possession or the land being vacant and unoccupied. *Ames et al. v. Sankey et al.* 523.

18. *Setting aside void tax certificates—upon terms.* On bill to set aside tax certificates when the sale is void, as being a cloud on title, the amount the complainant should be required to pay to entitle himself to the relief sought, is the amount paid at the tax sale, together with the subsequent taxes paid, and interest at the rate of six per cent per annum from the dates of the respective judgments. *Ibid.* 523.

**SPECIFIC PERFORMANCE.**

19. *Title in litigation.* Where, by the terms of a contract, the vendor is required to make the vendee a warranty deed at the termination of certain litigation concerning the title, the former can not object to a decree, on bill for specific performance, requiring him to convey whatever title he has, although his title has not yet been established in the litigation. *Bragg v. Olson et al.* 540.

20. *Laches—to defeat a specific performance.* Where the purchaser of land in 1863 was let into the immediate possession, and occupied and improved the premises up to his death, in 1867, and his widow and heirs continued in such possession for twenty years or more, it was held, on bill by the widow and heirs for a specific performance of the contract, that the defense of *laches* could have no application. *Ibid.* 540.

**ALLEGATIONS AND PROOFS.**

21. *In chancery—proof of any one of several grounds of relief sufficient.* If, from the allegations in a bill to set aside a sale made by an agent, and the facts proved, the transaction is deemed fraudulent in law, it is immaterial whether the allegations of fraud in fact are proved or not. If any alleged ground of relief is shown by the evidence, it will be error to dismiss the bill. *Tyler et al. v. Sanborn et al.* 136.

**CHANCERY. *Continued.*****ADMISSION IN ANSWER.**

22. *Whether evidence against a co-defendant.* In a contest between the mortgagee of chattel property and a purchaser from the mortgagor, in which the mortgagee claims the property as a fixture to real estate mortgaged to him, the answer of the mortgagor and his wife, admitting that the chattels were fixtures to the realty, is not evidence against the purchaser of the property from the mortgagor. *Long v. Cockern et al.* 29.

**RETAINING CAUSE FOR ALL PURPOSES.**

23. If a court of equity once acquires jurisdiction for any purpose, it will retain it for all purposes, and render complete justice between the parties. *Pratt et al. v. Kendig et al.* 293.

**TRIAL BY JURY—IN CHANCERY.**

24. *Upon what issues.* The statute of this State requires the submission to a jury of an issue arising upon the contest of a will on the ground of the alleged insanity of the testator, or of his want of mental capacity. The statute seems to be imperative in this respect. *Brown et al. v. Miner et al.* 148.

25. Where the question of the insanity of a defendant at the time of the execution of a note and mortgage is properly presented by the pleadings and by affidavit, the better practice is to submit that issue to a jury, if the chancellor is asked so to do. But under the statute, (Rev. Stat. chap. 22, sec. 40,) the duty of the court to submit such issue to a jury is discretionary, and not imperative. *Ibid.* 148.

26. *Issues agreed upon—conclusiveness.* Where the parties to a bill in chancery agree to the issues of fact to be submitted to the jury, neither of them will be permitted to allege that such issues were improper, either in form or substance. *Hoobler et al. v. Hoobler,* 645.

27. *Instruction—whether substituting new issues.* On bill to set aside a deed and a contract, on the ground of incapacity in the maker to transact business, and fraudulent and false representations, the court instructed the jury, that if either of these grounds was sustained, the allegation of the bill that said instruments were wrongfully and improperly obtained was made out: *Held*, that this was in no sense a substitution of new issues, but an instruction properly informing the jury as to what facts must be found to entitle the complainant to a verdict upon the issues already submitted. *Ibid.* 645.

28. *New trial—verdict against the evidence.* On bill to set aside a deed and contract made by a widow to an heir, on the ground that she, owing to old age, bodily infirmity, sickness and mental weakness, was incapable of transacting business, and that false repre-

**CHANCERY. TRIAL BY JURY—IN CHANCERY. *Continued.***

sentations were made by the grantee as to the condition and value of the estate and property released, the evidence was directly and sharply conflicting. The jury to whom the issues were submitted found in favor of the complainant, and their finding was approved by the trial court. The complainant's evidence clearly supported the finding and decree, and the evidence for the defendant merely raised a conflict, but there was no such preponderance in the defendant's favor as to show that the jury misconceived or misconstrued the evidence: *Held*, that in such a case the finding of the jury was conclusive in this court. *Hoobler et al. v. Hoobler*, 645.

**EXCEPTIONS TO MASTER'S REPORT.**

29. *Whether necessary.* Where a cause is referred to the master in chancery to take the evidence and report his conclusions of fact, if the evidence before the master is incompetent, or insufficient to establish a claim or fact against the defendant, he must file exceptions to the master's report, and if overruled, renew the same in the trial court, otherwise he can not afterward call in question the sufficiency of the evidence. The master's report, where no exceptions are taken, is conclusive on the parties. *Cheltenham Improvement Co. v. Whitehead*, 279.

**RECITALS IN DECREE.**

30. *How far conclusive.* Where a decree in a case which was referred to the master to take and report the evidence, recites that the cause was heard on the bill, answers, replication, and also the proof taken and reported by the master, such recital can not be contradicted or overcome by the clerk's certificate that there is no report of the master on the files. *Brown et al. v. Miner et al.* 148.

31. And where a decree recites the hearing of testimony in open court, and finds, from the evidence, the facts necessary to support the decree rendered, in the absence of a certificate of the evidence heard it will be presumed that there was sufficient evidence to warrant and sustain such finding. *Ibid.* 148.

**ADMINISTRATION OF ESTATES.**

32. *In chancery.* See ADMINISTRATION OF ESTATES, 1, 2, 3.

**INSANITY OF A CO-PARTNER.**

33. *Effect upon the partnership relation—rights and duties arising therefrom—remedy in chancery.* See PARTNERSHIP, 1 to 7.

**OF THE PLEADINGS—IN PARTITION.**

34. *Requisites of the bill—and whether a cross-bill is necessary or appropriate.* See PARTITION, 1, 2.

**SETTING ASIDE TRUSTEE'S SALE.**

35. *And allowing redemption.* See MORTGAGES AND DEEDS OF TRUST, 4, 5.

CHATTEL MORTGAGES. See MORTGAGES AND DEEDS OF TRUST, 9.

COLORED PERSONS.

CIVIL RIGHTS.

1. *Access to theaters, etc.—discrimination on account of race or color.* All persons in this State are entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of theaters, etc., subject only to the conditions and limitations established by law, and applicable to all citizens, and an action will lie against any one who shall deny another such rights and privileges on account of his race or color. *Baylies v. Curry*, 287.

2. So if the proprietor of a theater shall deny a colored person access to his theater, or to the several circles or grades of seats therein, on account of his race or color, he will be liable to such person so aggrieved in an action for damages. *Ibid.* 287.

3. In an action by a colored woman, against the proprietor of a theater, for denying her equal privileges, etc., the only case her evidence tended to prove was, that after having paid, through another, for a ticket to the first balcony, she was first denied admission thereto, and afterward denied admission to any part of the theater, on account of her color. On the trial, the defendant offered to prove that he had adopted a rule requiring colored people to sit in the same row, separate from white people, and that it was the rule of his theater that colored persons were given the same advantages, for the same price, in all parts thereof, that whites had, except that the former were assigned a particular row of seats,—which the court refused to allow: *Held*, that the court ruled properly, as the proposed evidence was irrelevant to the issue. *Ibid.* 287.

4. *Act of 1885—constitutionality.* It can not reasonably be contended that the provisions of "An act to protect all citizens in their civil and legal rights, and fixing a penalty for violation of the same," approved June 10, 1885, in so far as they give an action against the proprietor of a theater for denying a colored person access thereto, are void, as being repugnant to the constitution of this State or of the United States. *Ibid.* 287.

CONFLICT OF LAWS.

EXTRA-TERRITORIAL EFFECT OF DECREE.

1. *As to property in another jurisdiction.* Where a court of equity has jurisdiction over the person of a defendant, it may make its decrees and orders affecting his property which is situated outside of its jurisdiction, and enforce obedience to them by imprisonment. *Sercomb v. Catlin, Receiver*, 556.

RECEIVERS.

2. *Property in another jurisdiction—powers of a receiver.* See RECEIVERS, 1.

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**CONFLICT OF LAWS. Continued.****INSOLVENT DEBTORS.**

3. *Foreign assignment—how far enforceable here—as between foreign and domestic creditors.* See INSOLVENT DEBTORS, 1, 2.

**CONSERVATOR.****OF INSANE CO-PARTNER.**

- Accounting in the county court—whether conclusive, as respects a remedy in chancery.* See PARTNERSHIP, 6, 7.

**CONSIDERATION.****AS EXPRESSED IN A DEED.**

- Whether conclusive.* See CONVEYANCES, 1.

**CONSTITUTIONAL LAW.****TITLE OF AN ACT.**

1. *Constitutional requirement.* See STATUTES, 1.
2. *Of the title of the act of 1867 amendatory of the Township Organization law of 1874.* See TOWNSHIP ORGANIZATION, 4, 5.

**BUILDING ASSOCIATIONS.**

3. *Act of 1872—constitutionality—special law regulating interest.* See BUILDING ASSOCIATIONS, 1.

**COLORED PERSONS.**

4. *Civil rights—access to theaters, etc.—constitutionality of the act of 1885.* See COLORED PERSONS, 4.

**TRIAL BY JURY—IN CRIMINAL CASES.**

5. *Constitutional guaranty—waiver.* See CRIMINAL LAW, 1 to 4.

**MUNICIPAL INDEBTEDNESS.**

6. *Constitutional limitation.* See MUNICIPAL INDEBTEDNESS, 1, 2, 3.

**PRESENCE OF PRISONER IN COURT.**

7. *On error in the Supreme Court—the constitutional provision construed.* See CRIMINAL LAW, 7, 8, 9.

**TOWNSHIP ORGANIZATION.**

8. *Changing boundaries of towns, etc.—validity of amendatory act of 1887.* See TOWNSHIP ORGANIZATION, 1, 2, 3.

**CONTEMPT.****PROCEEDINGS AGAINST CORPORATIONS.**

1. A corporation can only be punished for contempt, through its officers, or those acting in aid of it. The court may proceed against the corporation or against its officers who do the act interfering with the proceedings of the court, or who had the control of the action of the corporation. *Sercomb v. Catlin, Receiver*, 556.

CONTINGENT REMAINDER. See ESTATES IN LAND, 1, 2, 3.

CONTINUANCE.

ABSENCE OF WITNESSES.

1. Certain witnesses of a defendant, duly subpoenaed, failed to appear when he had finished his other evidence, and he asked time to procure the absent witnesses. The court refused to delay longer than fifteen minutes. On motion for a new trial, the defendant, by affidavit, showed these facts, and the materiality of the testimony of the witnesses, but failed to show that the absence of the witnesses was not by his consent: *Held*, that for this omission alone the defendant failed to make a proper showing. *North Chicago City Ry. Co. v. Gastka*, 613.

CONTRACTS.

WHAT CONSTITUTES A CONTRACT.

1. *Offer, in proceeding for condemnation, to perform certain duties in advance of the statutory time.* See EMINENT DOMAIN, 9.

BY WHAT LAW GOVERNED.

2. *As to their validity, etc.—and the remedy.* As a general rule, the *lex loci* will govern in determining the validity of contracts, and in their interpretation and construction. It does not follow, however, that all contracts, valid when made, will be enforced by the courts of other States or jurisdictions. In respect of the time, mode and extent of the remedy, the *lex fori* governs. *Woodward et al. v. Brooks et al.* 222.

ENFORCING THE PROVISIONS SEVERALLY.

3. *Construction—of a bond given by a surviving partner to estate of a deceased partner.* In construing a bond given by a surviving partner to the personal representative of his deceased partner, all its provisions should be considered and carried into effect, and, when it is possible, the intention of the parties, as declared in each provision of the contract, should be enforced. *Miller et al. v. Kingsbury*, 45.

4. So where a surviving partner, under the order of the circuit court, executes to the personal representative of the deceased partner a bond conditioned for the faithful discharge of his duties as such surviving partner, and also for the payment to the obligee of whatever might be found due the latter, after paying the partnership debts and costs of settlement, at such time as the circuit court should order and direct, the obligee may maintain an action on the first named condition, on its breach, without any order of the circuit court directing the payment of money to her. An action will lie in favor of the obligee for the neglect of the obligor to apply partnership funds in his hands, to the payment of the partnership debts. *Ibid.* 45.

**CONTRACTS. *Continued.*****WHETHER INDIVIDUAL OR REPRESENTATIVE.**

5. *And herein, in what capacity to sue.* A surviving partner gave his bond, with sureties, to A B, administratrix of the estate of C D, the deceased partner, or to her successor or successors, conditioned for the faithful discharge of his duties as such surviving partner, etc.: *Held*, that the words following the name of the obligee were merely *descriptio personæ*, and might be treated as surplusage, and that she might maintain an action for a breach of the conditions of the bond in her individual name. *Miller et al. v. Kingsbury*, 45.

**RESCISSON OF CONTRACTS.**

6. *Right of rescission—conditions upon which it rests.* See VENDOR AND PURCHASER, 1 to 6.

**IN CASE OF DEPENDENT CONDITIONS.**

7. *Waiver of prior performance.* Same title, 8.

**PURCHASE MONEY ON SALE OF LAND.**

8. *Contract for its payment—construed—as to liability being discharged after payment in part.* See CONVEYANCES, 5.

**CONVEYANCES.****CONSIDERATION.**

1. *As expressed in the deed—whether conclusive.* A deed, by expressing a consideration, does not necessarily import that such sum is to be paid by the grantee to the grantor in any event, so as to fix an indebtedness independent of a contemporaneous agreement of the parties fixing the mode of payment and determining the amount which shall ultimately be paid. It is competent for the parties to agree upon a different consideration, or to agree that the consideration recited in the deed shall be payable only conditionally, and if they do so, and reduce their contract to writing, the same conclusive presumptions will arise as in other cases,—that all the terms of their contract are embodied in the writing. *Fort, Admr. v. Richey, Admz.* 502.

**DELIVERY OF DEED.**

2. *A transaction considered.* The holder of the legal title to a lot made a deed to another party, but instead of delivering the same, placed it in escrow in a bank, with this direction over his signature on the envelope containing the deed: "To be delivered in case of my death." Subsequently the grantor revoked the power to deliver the deed, but allowed it to remain with the bank. After the grantor's death the grantee obtained the deed by replevin, and had the same recorded. No intervening rights were acquired: *Held*, that the case must in all respects be treated as if the deed had remained undelivered. *Stewart et al. v. Fellows et al.* 480.

**CONVEYANCES. *Continued.*****AS TO THE EFFECT OF A DEED.**

3. *As a question of law or fact.* The effect of a deed is a question of law for the court; but whether there is an instrument purporting to be a deed conveying a particular tract of land, is a question of fact. *Strean et al. v. Lloyd et al.* 493.

**SEPARATE CONTRACT AS TO PAYMENT.**

4. *The deed and contract construed together.* A father conveyed his farm to his son on July 30, for the expressed consideration of \$5000, of which one-half was paid down. On the 5th of August following, the son gave the father, for the balance due, his obligation to pay the latter \$175 per annum during his life, and as much more as might be necessary to the father's support and comfort, containing a proviso, however, that the total of such payments or advances should not exceed \$2500, and interest thereon: *Held*, that the contract of the son, and the deed to him, though bearing different dates, were parts of the same transaction, and should be construed together, as they both related to the same subject matter, and were based upon the same consideration. *Fort, Admr. v. Richey, Admx.* 502.

5. *Contract as to payments—construed—as to liability being discharged after payment in part.* A father conveyed land to his son for the expressed consideration of \$5000. The son paid \$2500 in cash, and gave his written agreement to pay the father, as an annuity, the sum of \$175 during the life of the latter, and such further sums as might be necessary to minister to his comfort or satisfaction, but it was therein provided that the total of all such payments and advances should not exceed \$2500, and interest thereon. The yearly payments were made during the father's life, amounting to \$1410: *Held*, that the son was not liable to the father's estate for the balance of the \$2500, or purchase price, and that his liability was discharged by performance of his written agreement to pay the annuity during his father's lifetime. *Ibid.* 502.

**APPURTENANCES.**

6. *What so regarded—right of way, coal office—weighing scales—railroad side-track.* The owner of a lot conveyed the north half thereof, reciting in the deed that he "expressly reserves from this conveyance the right of way over and across the north half of said lot to the south half thereof, and back again, for teams and men," and afterward conveyed the south half, "with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining." *Held*, that the right of way over the north half of the lot was appurtenant to the south half, and passed under the conveyance of the latter. *Chicago, Santa Fe and California Ry. Co. v. Ward,* 349.

7. The owner of a lot, the north end fronting on a public street, conveyed by deed the north half of the lot to A, reserving therein

**CONVEYANCES. APPURTENANCES. *Continued.***

a right of way over the same to the south half, and also a coal office located on the north end of the lot. The grantor, and A, the grantee, then made an agreement, which was recorded, in which it was recited that A had bought an undivided half of certain scales situated on the north half of the lot, near the coal office, and that a railway company was about to build a side-track along the west side of the lot for the convenience of business on said lot, and it was thereby agreed that each should own, pay for and keep in repair the undivided one-half of the said scales and side-track, and that the scales should be owned and used jointly. A conveyed the north half with the same reservations, and by *mesne* conveyances the title was vested in B, who conveyed to C, a railway company. While the original owner was in the use and enjoyment of the right of way reserved, he conveyed the south half to C and D, with the appurtenances, and they conveyed to W., all of which deeds were recorded. The agreement in respect to the scales and side-track was assigned by A to his grantee, and passed, by successive assignments, to the subsequent owners of the south half, which assignments were recorded. By the deeds from the original owner and his grantees, the undivided half of the scales was also conveyed to W., and the proof showed that W. and his grantees had used the coal office, right of way and side-track for over twenty years, in connection with the coal business on said lot: *Held*, on a proceeding to condemn the south half of the lot, that the right of way over the north half of the lot, the coal office, and the undivided half of the scales and side-track, were to be regarded as an appurtenance to the south half of the lot. *Chicago, Santa Fe and California Ry. Co. v. Ward*, 349.

**LIMITATION AS TO USE.**

8. *As, in respect to use of parts of the lots conveyed—a deed construed.* The plat of an addition to a town showed a dotted line across the north end of the lots, twenty feet south of their northern termini, marked "line of front of buildings." The deeds of the proprietor granted the lots by their numbers upon the plat. After the granting clause were the words, "together with the exclusive use of the court-yard between said lots and the street," thereby referring to the twenty-foot strip off the north end of the lots, "upon condition that such yard shall only be used as a front-door yard, and that said party of the second part shall put no building upon said yard except front-door steps, nor erect any fence of unusual height, which shall obstruct the view of the neighborhood." *Held*, that such restriction in the use of the north twenty feet was intended for the benefit of the other lots fronting on the same street, and to the extent of such restriction it created an implied equitable servitude of each lot in favor of the other lots. *Eckhart et al. v. Irons*, 568.

**CONVEYANCES. LIMITATION AS TO USE. *Continued.***

9. In such case, each purchaser taking such a deed took the estate burdened with a like servitude in favor of all the lots, and an equitable easement attached to each and every lot so conveyed, so that the equitable rights and burdens of each lot were mutual and reciprocal, and each lot owner was subjected to the equitable burden, and entitled to the enjoyment of the easement. *Eckhart et al. v. Irons*, 568.

10. Such clause in a deed for a lot did not have the effect of limiting the grant to the dotted line, as the grant was of the whole lot as platted. The clause, "together with the use of the court-yard between said lot and the street," must be construed with the plat, and what precedes and follows in the deed. *Ibid.* 568.

11. The deeds, after such words of limitation as to the use of the court-yard, further recited: "It being the intention of the party of the first part, in reserving said court-yard, to benefit and improve the neighborhood, said reservation to continue for fifteen years from the date of record of the plat of said subdivision; after the expiration of said term, the fee of said court yard shall vest in said party of the second part, his heirs and assigns, without any further conveyance." There was no clause for forfeiture for the breach of any condition: *Held*, that the estate was not one upon condition, and that the title vested in the grantee to the whole of the lot, and that the clause was simply a limitation upon the use of the north twenty feet for the period of fifteen years from the recording of the plat. *Ibid.* 568.

12. *Restrictions as to use of property—not favored—but enforceable.* Restrictions on the use of property held in fee are not favored, yet when the intention of the parties is clearly manifested in the creation of restrictions or limitations upon the use of the grantee, for the use of the grantor, his heirs or assigns, a court of equity will enforce the same. *Ibid.* 568.

**EXCEPTIONS—RESERVATIONS.**

13. *The distinction.* The clause in the deed in this case does not create an exception, for the reason that by an exception the grantor withdraws from the effect of the grant some part of the thing itself which would otherwise be included in the grant. Nor can it, strictly speaking, be said to be a reservation, for a reservation must be to the grantor or the one creating the estate, and must be of something arising out of the thing granted, as, an easement, or the like. *Ibid.* 568.

**REPUGNANT PROVISIONS.**

14. *Rule of construction.* Where, in construing a deed, there is a clear repugnance between the grant and that limited in the *habendum* or *reddendum*, the latter will be required to yield to the clear

**CONVEYANCES. REPUGNANT PROVISIONS. *Continued.***

words of the grant; but if the words following the grant can be so construed that all may stand together, by limiting the estate, without contradicting the grant, that construction must be adopted to give effect to each clause of the deed. Where there is a present grant, any words showing it is to take effect *in futuro* are inconsistent with the grant. *Eckhart et al. v. Irons*, 568.

**CORPORATIONS.****QUESTIONING VALIDITY—ESTOPPEL.**

1. *A party who has contracted with a corporation de facto, as such, can not be permitted, after having received the benefits of his contract, to allege any defect in the organization of such corporation, as affecting its capacity to enforce such contract, but all such objections, if valid, are available only on behalf of the sovereign power of the State.* This rule applies when the corporation is organized under a law alleged to be unconstitutional. *Winget et al. v. Quincy Building and Homestead Association*, 67.

BUILDING ASSOCIATIONS. See that title, 1 to 4.

**CONTEMPT.**

*Proceedings against corporations.* See CONTEMPT, 1.

**COSTS.****ON APPEAL.**

1. *Where there is no jurisdiction.* Where an appeal is taken to the Appellate Court in a case involving a franchise, and is there entertained, and an appeal is taken from that court to this court by the same party, the judgment of the Appellate Court will be reversed and the cause remanded, with direction to dismiss the appeal, and no costs will be taxed in either court against the appellee. *The People et al. v. O'Hair et al.* 20.

2. *Upon modification of decree—on appeal.* Where a decree for a mechanic's lien, on appeal, was modified by a reduction of the amount found to be due, but otherwise affirmed, this court directed that each party pay one-half the costs in this court. *Chisholm v. Williams et al.* 115.

**BOND FOR COSTS.**

3. *In suit in behalf of minor—at what stage of the suit it may be filed.* An action brought by the next friend of an infant without an order of appointment or the filing of a bond for costs, will not be dismissed, if such bond be given when so ordered by the court. The giving of the bond for costs is not a jurisdictional matter. *Illinois Central Railroad Co. v. Latimer*, 163.

**COURTS.****FOR TRIAL OF CRIMINAL CASES.**

*How constituted—of what officers a court must consist.* See CRIMINAL LAW, 5.

**CREDITOR'S BILL.** See CHANCERY, 5 to 11.

**CRIMINAL LAW.****TRIAL BY JURY—IN CRIMINAL CASES.**

1. *Constitutional guaranty—waiver of jury—whether allowable, so as to confer jurisdiction upon the judge.* By the constitution of the State, the common law right to a trial by jury in criminal cases is guaranteed, and declared to be inviolable, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It thus seems that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded. *Harris v. The People*, 585.

2. So in a prosecution for a felony, when the plea of not guilty is entered, the right to a jury trial can not be waived by the accused, so as to confer upon the court jurisdiction to try, convict and sentence the defendant without the intervention of a jury. *Ibid.* 585.

3. It is true, a defendant in a criminal case may waive a trial by jury by plea of guilty. But while he may waive a trial by jury, he can not, by such waiver, confer jurisdiction to try him by a tribunal which has no such jurisdiction by law. *Ibid.* 585.

4. A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury he has, by law, no jurisdiction. If he attempts to sit as a substitute for a jury, and perform their functions in such cases, his act must be regarded as nugatory. *Ibid.* 585.

5. *Court for trial of criminal cases—of what officers it must consist.* The Criminal Court of Cook county, and the circuit courts, when properly constituted for the trial of criminal cases, and especially for the trial of felonies, consist not merely of a judge, but also of a clerk, a sheriff, a State's attorney and a jury. The judicial functions brought into exercise in such trials are parceled out between the judge and the jury, and so long as there is no law authorizing it, the functions to be exercised by the jury might just as well be transferred, by agreement of the parties, to the clerk or sheriff, as to the judge. *Ibid.* 585.

6. *Jurisdiction by consent.* It is a maxim in the law, that consent can never confer jurisdiction; by which is meant that the consent of the parties can not empower a court to act upon subjects which

**CRIMINAL LAW. TRIAL BY JURY—IN CRIMINAL CASES. *Continued.***

are not submitted to its determination and judgment by the law. The law creates courts, and, upon considerations of public policy, defines and limits their jurisdiction, and this can neither be enlarged nor restricted by the act of the parties. *Harris v. The People*, 585.

**PRESENCE OF PRISONER IN COURT.**

7. *In the trial court, and in the Supreme Court.* The common law required, when any corporal punishment was to be inflicted on the defendant, that he should be personally present before the court at the time of pronouncing the sentence. The reasons for this were, that the defendant might be identified by the court as the real party adjudged guilty; that he might have a pardon to plead, or move in arrest of judgment; that he might have an opportunity to say why judgment should not be rendered; and that the example of being brought up for the animadversion of the court and the open denunciation of punishment, might tend to deter others from like offenses. None of these reasons can apply to the judgments of affirmance by this court in criminal cases. *Fielden et al. v. The People*, 595.

8. On writ of error to reverse a judgment in a capital case, the personal attendance of the defendant on the argument or at the decision of the court is not necessary to give such court jurisdiction. Such attendance is not required by the practice of this court or by any statute, but on the contrary, the statutes on the subject contemplate that such defendant will not be present in this court at any time. *Ibid.* 595.

9. The provisions of section 9, article 2, of the State constitution, that "in all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial," etc., have no application to writs of error by which the accused seeks to have a judgment against him reversed. Such a proceeding is not a criminal prosecution. *Ibid.* 595.

**FIXING DATE OF EXECUTION.**

10. *By the Supreme Court—a ministerial act.* The naming of the day by the Supreme Court, on judgment of affirmance, when the judgment of conviction is to be executed, is but the exercise of a ministerial power, which, at the common law, was sometimes exercised by the sheriff. In this State the power may be exercised by the Governor in case of a temporary reprieve. *Ibid.* 595.

**CROSS-ERRORS. See PRACTICE IN THE SUPREME COURT, 6.**

**CURTESY.**

**TENANCY BY THE CURTESY.** See **HUSBAND AND WIFE**, 2 to 8.

**DEDICATION.****OF THE ESSENTIAL ELEMENTS.**

1. An intention to dedicate land must be clearly and unequivocally manifested by the owner, and there must be an acceptance of the dedication. *Eckhart et al. v. Irons et al.* 568.

**EXTENT OF GROUND DEDICATED.**

2. *Dotted lines on plat, as limiting dedication.* A plat of lots in a block showed a dotted line across the north end of the lots, twenty feet south of the street on which the lots fronted, with the words along such dotted line, "line of front of building twenty feet from the street." The lines indicating the east and west boundaries of the lots did not stop at such dotted line, but extended to the street: *Held*, that such dotted line did not show an intention to dedicate the twenty feet off the north end of the lots, but on the contrary, the words along such line clearly negatived any such intent. Such line is but a designation on the plat of the front line of the buildings to be erected thereon. *Ibid.* 568.

**DEEDS OF TRUST.** See **MORTGAGES AND DEEDS OF TRUST**, 2 to 5.

**DELIVERY OF DEED.** See **CONVEYANCES**, 2.

**DIVORCE.****CUSTODY OF THE CHILDREN.**

1. Although the general rule that the custody of the children will be given to the party in whose favor the divorce is granted, is never enforced when the welfare of the children will be injuriously affected by its enforcement, yet it must be clearly shown that their welfare does really require the abrogation of the rule. *Umlauf v. Umlauf*, 378.

2. The right of the father is superior to that of every other person, and can only be made to yield when it is manifestly inconsistent with the health and welfare of the child. *Ibid.* 378.

3. In this State it may sometimes be proper to give to the mother the custody of the children in case of a divorcee, even when the divorce is granted on account of her desertion of her husband. *Ibid.* 378.

4. The controlling consideration with a court of equity, when both the husband and the wife are equally fit to have the care of the children, is the welfare and best interests of the children, and not the gratification of either parent. In such cases, the custody is often given to the mother when the health or tender years of the

**DIVORCE. CUSTODY OF THE CHILDREN. *Continued.***

children require her care and attention. The common law right of the father to the custody of his infant child will be made to yield to the discretionary power over the subject vested by the statute in the court. *Umlauf v. Umlauf*, 378.

5. In this case the considerations are stated which induce the court to give the custody of the oldest son, aged about ten years, to the father, and the youngest son, aged about seven, to his mother. *Ibid.* 378.

**DOMINANT AND SERVIENT HERITAGE. See WATER-COURSES, 1, 2, 3; DRAINAGE LAW, 1.****DOWER.****RIGHTS OF WIDOW.**

1. *Generally.* Under the statute of 1845, and also under the present statute, upon the death of the husband, dower in the wife becomes consummate in all cases when he dies intestate; and the question as to what class of heirs he leaves, or, in fact, whether he leaves heirs or not, is of no consequence. Should the fee be disposed of to others, either by the Statute of Descents or by a sale to pay debts, this dower right continues to exist, and can only be divested by the voluntary act of the widow. *Shoot v. Galbreath*, 214.

**MERGER OF DOWER RIGHT.**

2. *In a larger estate.* Should the widow, however, become the owner of land in fee, or any part of it, her dower, as in other cases where a greater and lesser estate unite in the same person, is merged in the fee, and, of course, can not be asserted. *Ibid.* 214.

**DEATH OF HUSBAND WITHOUT ISSUE.**

3. Since the Statute of Descents of 1872, and the Dower act of 1874, as was the rule under the act of 1845, should the husband die without leaving lineal descendants, his widow will take, as heir, one-half of his lands, and will be entitled to dower in the other half thereof. *Ibid.* 214.

**RELINQUISHMENT OF DOWER.**

4. *Effect of widow making deed as administratrix.* A widow, who in her capacity as administratrix makes a deed for lands of her deceased husband sold under a decree of court to pay debts, does not thereby relinquish her dower in such land, unless it is so specified in her deed, or she makes statements or does acts calculated to mislead the purchaser. *Ibid.* 214.

**DAMAGES FOR NON-ASSIGNMENT.**

5. *Requisites of the bill—time to object.* A widow is entitled to damages for the non-assignment of dower from the time of the filing of her bill for dower, that being, in law, a demand. The

**DOWER. DAMAGES FOR NON-ASSIGNMENT. *Continued.***

damages, however, should be claimed in the bill, by amendment or otherwise. But when both parties offer evidence on the question of damages, without objection, in the court below, the objection that the bill makes no such claim comes too late when made for the first time in this court. *Shoot v. Galbreath*, 214.

**DRAINAGE LAW.****RIGHTS OF DOMINANT HERITAGE.**

1. *Under section 42 of the Drainage act of 1885*, the owner of lands outside of a drainage district may connect with ditches of the district already made, and thus drain his own lands; but by so doing he will virtually annex his lands to the district, and subject them to at least the same burdens which they would have borne if they had been originally included in the district. But he can not, under that section, divert into the district the drainage of large tracts belonging to other proprietors, who have taken no action in the matter, and whose lands are not brought into the district and made to assume any of its burdens. *Dayton v. Drainage Comrs.* 271.

**GIVING CREDIT FOR OLD DRAINS.**

2. *At what time allowance to be made—remedy of land owner.* Section 22 of the Drainage act authorizes the commissioners, where an old drain has been in whole or in part constructed, and such work can be advantageously utilized, to estimate the value of such old ditch, and allow the owner proper credit for the same, on making an assessment for drainage purposes. But this can not be done after the commissioners have made their assessment and filed the assessment roll with the town clerk. *The People ex rel. Barber, Collector, v. Chapman et al.* 496.

3. If the commissioners allow a land owner for ditches or drains previously made, and used by them, this must be done when they make the assessment, under section 26 of the act, and the amount they then allow may be credited on the assessment. If the land owner is not satisfied with the amount allowed him as a credit and deducted from his assessment, he may appeal, under section 27 of the act. It is not competent for the county court, on application for judgment, to allow any credit for prior drains used by the district. *Ibid.* 496.

**FILING ASSESSMENT ROLL.**

4. *As concluding authority of commissioners.* After the assessment roll has been made and filed with the town clerk, the commissioners will have no power over it, the matter having thereby passed beyond their jurisdiction. If errors exist needing correction, the party aggrieved will have a remedy by appeal. *Ibid.* 496.

**DRAINAGE LAW. *Continued.*****OMITTING LANDS FROM ASSESSMENT.**

5. At the time of the organization of a drainage district under the act of 1879, an assessment of nearly \$5000 was levied on the lands of the district. After the act was amended in 1885, the commissioners made a new classification of the lands under section 21 of the amendatory act, and levied a new assessment of \$5000, and also an additional assessment of \$2000, to be paid in two installments. At the time of making this levy, the commissioners credited certain lands with the full amount levied against them, so as to relieve them entirely from the levy, on the ground they were not benefited: *Held*, that this was the same as to wholly omit to assess the lands so credited, and that such action rendered the whole assessment void. *The People ex rel. Davidson, Treasurer, v. Cole et al.* 158.

6. Drainage commissioners have no power to release lands within the district of their proportion of the assessment based on the last classification. Both the letter and spirit of the statute require that the burdens of the district shall be apportioned on the basis of a classification of lands in the district, which each owner had an opportunity to contest. *Ibid.* 158.

**RE-CLASSIFICATION OF LANDS.**

7. *Notice to owner.* Upon every classification of lands in a drainage district each land owner has an interest, and in order that he may be protected in that interest, he is entitled to notice of the "time when and the place where" the commissioners will meet to hear any and all objections that may be made to the classification, and if dissatisfied with the decision of the commissioners, he is given an appeal to three supervisors. *Ibid.* 158.

**EASEMENT.****NON-USER.**

1. *Presumption of extinguishment.* The non-user of an easement by the public for twenty years affords a presumption of extinguishment, though not a very strong one, in a case unaided by circumstances; but if there has been, in the meantime, some act done by the owner of the land sought to be charged with the easement, inconsistent with or adverse to the right, an extinguishment will be presumed. *Village of Auburn v. Goodwin et al.* 57.

2. Where the owner of a block of ground in a village has been in the open, adverse and exclusive possession of the alleys running through the same, for more than twenty years, the non-user of the alleys for such length of time will bar a recovery of the same, in ejectment by the village. *Ibid.* 57.

**EJECTMENT.****GROUND OF RECOVERY.**

1. *Plaintiff must recover on the strength of his own title.* In an action of ejectment, the plaintiff must recover, if at all, upon the strength of his own title. The legal title alone is involved. *Village of Auburn v. Goodwin et al.* 57.

**AMENDMENT OF DECLARATION.**

2. *In ejectment.* The circuit court has authority, under section 23 of the Practice act, to allow the plaintiff in ejectment to amend the declaration by changing the parties and correcting the description of the land sued for. *Strean et al. v. Lloyd et al.* 493.

**ATTORNEY'S AUTHORITY.**

3. *To institute and prosecute the suit.* Under the statute, any written recognition of the attorney's authority to commence an action of ejectment, duly proved as therein provided, is made presumptive evidence of such authority at the time the suit was brought. *Ibid.* 493.

4. Where a written recognition of an attorney's right to prosecute an action of ejectment for lands situate in one county, inserts the name of another county as the place where the suit is to be prosecuted, the naming of the wrong county will be regarded as a clerical error, and will be rejected as meaningless. Authority to prosecute such a suit necessarily implies authority to prosecute it in the county where the land lies. *Ibid.* 493.

**AS TO EXTENT OF RECOVERY.**

5. *Sufficiency of evidence.* Proof of title in A and B, and a conveyance from B to C, and a deed of trust from C to D, and his death, leaving the plaintiffs his only heirs, will not sustain a judgment in ejectment in favor of the plaintiffs for the entire interest in the land. At most, such evidence shows a right of recovery only of the undivided half of the land. *Ibid.* 493.

**REMITTITUR IN THE SUPREME COURT.**

6. *And entry of judgment for the proper quantity.* Where judgment is rendered on the first trial in an action of ejectment for a tract of land, on proof of title to only an undivided half in the plaintiff, this court will not allow the plaintiff to enter a *remititur*, and take judgment for the undivided half of the land. *Ibid.* 493.

**EMINENT DOMAIN.****TRIAL BY JURY.**

1. *Waiver—as to preliminary facts.* Where the petitioner, in a proceeding to condemn land for railroad purposes, makes no objection below to the action of the court in hearing evidence in reference to the title and rights of the defendant in the premises sought to be taken, and finding those rights without a jury, but

**EMINENT DOMAIN. TRIAL BY JURY. *Continued.***

participates in such hearing and offers evidence, it will be estopped from making the objection in this court that the preliminary facts were not found by a jury. In a civil case it is always competent for the parties to waive a jury and submit their case, or any part of it, to the court for decision. *Chicago, Santa Fe and California Ry. Co. v. Ward*, 349.

2. *General exception—to what it relates.* On petition to condemn, before the case was submitted to the jury, the record showed that the parties appeared, and each introduced preliminary proof to the court as to the extent of the defendant's interest and right, without objection or protest, and made suggestions to the court, and that the court found such right and interest of the defendant in the premises, after which the record recited, "to which ruling and order of the court the petitioner now here excepts:" *Held*, that the exception had reference to the conclusion reached by the court after hearing the preliminary proofs, and not to the fact that the court heard and passed upon such proofs without a jury. *Ibid.* 349.

**MEASURE OF DAMAGES.**

3. *Elements to be considered, generally.* In a proceeding to condemn land for public use, the owner is entitled to just compensation for any property taken or injured. Such compensation is to be estimated according to the existing condition of the property at the time. He is not required to remove buildings or other things attached to the realty, in order to lessen his damages. *Ibid.* 349.

4. *Rights appurtenant as an element.* On a proceeding to condemn the south half of a lot, to which was annexed, as appurtenances, a right of way over the other half of the lot, a coal office and scales also upon such other half, and a side-track in an adjacent alley, such appurtenances are property interests connected with the land sought, and there is no error in instructing the jury to take such rights, privileges and appurtenances into consideration in determining the fair market or cash value of the south half of the lot, as they are proper elements of value to the property to which they belong. *Ibid.* 349.

5. Where a lot sought to be taken for a public use is used for a coal yard, in connection with its appurtenances, which are, a right of way over an adjoining lot to a public street, a right to the use of a coal office and a pair of scales on the latter lot, and of a side-track from a railroad, and the lot sought is of but little value without such rights and privileges in the other lot, the jury, in estimating the compensation to the lot sought, should consider its value in connection with its appurtenances. *Ibid.* 349.

6. A acquired title to the south half of a lot, to which was appurtenant a right of way over the north half, and a coal office and

**EMINENT DOMAIN. MEASURE OF DAMAGES. *Continued.***

scales on the north half of the lot, and also a switch-track along the lot. A railway company, by deed, acquired the title to the north half of the lot, and sought to condemn the south half of such lot. A, the owner thereof, by cross-petition, claimed damages for the value of his lot as enhanced by these appurtenances, or for the value of the appurtenances. The railway company never offered to allow A to remove the coal office and scales from the north half of the lot, and there was no evidence tending to prove that the property had any value to A if left remaining thereon, or that their removal was practicable, but on the contrary, the court included the coal office and scales in its judgment of condemnation: *Held*, that A, under the facts, was entitled to recover, as compensation, the value of such property as it stood at the time. *Chicago, Santa Fe and California Ry. Co. v. Ward*, 349.

7. *How far controlled by the stipulation of petitioner.* It is competent upon the trial of a condemnation proceeding, for the petitioner to bind itself, by an offer in open court, to the performance of duties, such as to inclose its right of way over the defendant's land in a shorter time than required by statute, and construct and maintain a suitable and proper underground crossing under the road-bed, etc., and thereby, and to the extent that such performance will prevent damages that would otherwise occur, abridge the land owner's claim for damages. *Elgin, Joliet and Eastern Railroad Co. v. Fletcher et al.* 619.

8. Where the petitioner, on the trial, offers and agrees to fence its right of way over defendant's land, and make the necessary, suitable and proper farm crossings and cattle-guards on or before a day named, which is a less period than the statute fixes, all the damages recoverable because of the road not being fenced, or for want of crossings, etc., will be those sustained before the day named. *Ibid.* 619.

9. *Offer of petitioner—how far binding as a contract.* If an offer of the petitioner, in open court, on the trial, to make fences, crossings, etc., in a shorter period than that required by statute, is taken in consideration in the assessment of damages, the liability of the petitioner in that regard will thereafter become one by virtue of express contract, and if the contract is not performed, an action will lie for its breach. *Ibid.* 619.

10. *Binding character of offer of petitioner as a question of law or fact.* Whether an offer by a railway company, on the assessment of damages for a right of way, to fence its road and make crossings by a day named, is binding on the company, is not a question of fact for the jury, but is purely a question of law, and it is error to submit such question to the jury as one of fact. *Ibid.* 619.

**EMINENT DOMAIN. MEASURE OF DAMAGES. *Continued.***

11. *Judgment of condemnation subject to performance of stipulation.* Where the petitioner, on the trial, in open court, agrees to perform duties not required by the statute, or in less time than the law requires, for the purpose of lessening the damages, the judgment should vest the rights obtained by the condemnation, subject to the performance of such duties, so as to insure their performance. *Elgin, Joliet and Eastern Railroad Co. v. Fletcher et al.* 619.

**EQUITABLE CONVERSION.****AS, A CHANGE IN THE NATURE OF PROPERTY.**

*Real estate to personal, and personal estate to real.* See **WILLS**, 8 to 12.

**ESTATES IN LAND.****ESTATE IN REMAINDER.**

1. *Whether vested or contingent.* A remainder is vested when a present interest passes to a party to be enjoyed in the future, so that the estate is invariably in a determinate person after the particular intervening estate terminates; while a contingent remainder is one limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event. *Haward et al. v. Peavay*, 430.

2. It does not follow, however, that every estate in remainder which is subject to a contingency or condition, is a contingent remainder. The condition may be precedent or subsequent. If the latter, the estate vests immediately, subject to being defeated by the happening of the condition, while in the former the remainder can not vest until that which is contingent has happened, and therefore become certain. *Ibid.* 430.

3. A testator devised all his estate to his executors, in trust, for the benefit of his widow for life, or until her marriage, with the remainder to such of his children as should be alive at the termination of the precedent estate, or to the lawful issue of such of them as might be dead leaving such issue: *Held*, that the estate devised to the sons was a contingent remainder, until the happening of the contingency that the persons who were to take the estate should be alive at the death or re-marriage of the widow. In such case, it makes no difference that the sons were named in the devise. *Ibid.* 430.

**EQUITABLE CONVERSION.**

4. *As, a change in the nature of property—real estate to personal, and personal estate to real.* See **WILLS**, 8 to 12.

**ESTATE OF HUSBAND IN THE WIFE'S LAND.**

5. *At the common law—of the estate during coverture—and estate by the curtesy.* See **HUSBAND AND WIFE**, 2 to 8.

**ESTOPPEL.****VALIDITY OF CORPORATION.**

*Estoppel to question it—by one who has had dealings with it.* See CORPORATIONS, 1.

**EVIDENCE.****DECLARATIONS OF PERSON INJURED.**

1. *In suit to recover for the injury—whether of the res gestae.* In an action against a city railway company to recover damages for personal injury to plaintiff's intestate, a boy, causing his death, it was claimed that the boy was thrown from a car and run over. After the boy had got up and walked to the sidewalk and had sat down, he stated, in answer to a question as to what was the matter, that the conductor threw him off the car. These statements were admitted in evidence: *Held*, that the court erred in admitting evidence of such statements, as they were not a part of the *res gestae*. *Chicago West Division Ry. Co. v. Becker*, *Admr.* 545.

2. The declarations of a party before his death, not made at the time of the accident in which he received the injury causing his death, nor concurrently therewith, and which fail to explain or characterize the manner in which the accident occurred, are not admissible in evidence. *Ibid.* 545.

3. The true inquiry is, whether the declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history, or a part of a history, of a completed past affair. In the one case it is competent, in the other it is not. *Ibid.* 545.

**DEPOSITION IN ANOTHER SUIT.**

4. A deposition taken in a prior suit may be read in evidence in a second suit, when the parties in interest in both suits are the same, and the issues in both suits are substantially the same. *Pratt et al. v. Kendig et al.* 293.

**OPINIONS OF WITNESSES.**

5. *As experts.* In a suit by a child six years old, against a railway company, to recover for injury sustained by ejecting her from a train, the plaintiff endeavored to prove that she was suffering from heart disease, produced by the fright she received when put off the train, and asked physicians whether fright would produce the heart trouble: *Held*, that the question was proper. *Illinois Central Railroad Co. v. Latimer*, 163.

**ATTACKING JUDICIAL PROCEEDINGS COLLATERALLY.**

6. *Effect of mere error.* A decree, however erroneous it may be, is binding upon the parties until vacated or reversed. *Gould et al. v. Sternberg*, 510.

## EVIDENCE.

ATTACKING JUDICIAL PROCEEDINGS COLLATERALLY. *Continued.*

7. *Determination of a fact—conclusiveness—in a collateral proceeding.* A judgment or decree which necessarily affirms the existence of any fact, is conclusive upon the parties and their privies whenever the existence of that fact is again in issue between them. So a decree vesting title in the complainant is *res judicata* as to the defendants and their privies, and can not be questioned by them in an action of ejectment, even upon facts not presented in the prior suit. *Gould et al. v. Sternberg*, 510.

## WILL—TO SHOW TRANSFER OF PROPERTY.

8. *Competency of will of deceased party to show transfer of property and claim of ownership.* A party taking the title to a lot as a security for the purchase money advanced, by his will bequeathed and devised the property to F., subject to the condition that in case one S. (the debtor) should, within one year, pay to F. "such principal and interest as shall, at the time of such payment, be due me on an account now open between us, the principal sum and interest thereon, then I authorize and empower said F. to convey said realty to said S., and in said case I give and bequeath to said F. such sum of money so paid," etc. The testator, in his lifetime, made a deed of the property to the wife of S., and left it with his banker, to be delivered in case of his death. On bill to foreclose S.'s equity of redemption, the court admitted this will in evidence, over the defendant's objection: *Held*, that the will was competent evidence to show complainant's title by the devise, and that it was also competent evidence as tending to sustain the contention that the deed had not been delivered to the wife of S., and was not intended to be delivered except on payment of the open account. *Stewart et al. v. Fellows et al.* 480.

## PAYMENT—IN WHOSE FUNDS.

9. *Proof that money paid was that of the trustee paying the same, and not that of the cestui que trust.* A, the purchaser of a lot under a bond for a deed or contract of purchase, assigned his contract to B, who paid nothing therefor, and who gave to A a writing showing he held the property as trustee, for A's use and benefit. When the purchase money fell due, B, the trustee, paid the same to the original vendor, and took a deed to himself, by the consent of A, and also took up A's note given for the price, and retained the same until his death: *Held*, that these facts afforded *prima facie* evidence that the money paid by the trustee was his own, and not that of A, the *cestui que trust*. *Ibid.* 480.

## CROSS-EXAMINATION.

10. Where a witness is asked, on cross-examination, about a matter not testified to by him on his direct examination, the ques-

**EVIDENCE. CROSS-EXAMINATION. *Continued.***

tion will be obnoxious to an objection as not being proper cross-examination. *Hanks v. Rhoads et al.* 404.

**PAROL EVIDENCE.**

11. *To establish an advancement.* See ADVANCEMENT, 1, 2, 3.

**ADMISSION IN ANSWER IN CHANCERY.**

12. *Whether evidence against a co-defendant.* See CHANCERY, 22.

**TOWN BOARD OF REVIEW OF ASSESSMENT.**

13. *Evidence—to show meeting and adjournment of the board.* See TAXATION AND TAX TITLES, 4.

**EXCEPTIONS AND BILLS OF EXCEPTIONS.****EXCEPTION.**

1. *General exception—to what it relates.* See EMINENT DOMAIN, 2.

2. *When necessary to be taken.* On application of a defendant for leave to file an amended plea in abatement to a writ of attachment, the court remarked that no action would be taken granting leave until affidavit was filed, showing, etc. No exception was taken: *Held*, that if the remark of the court was to be taken as a denial of the motion, the ruling could not be assigned for error, for want of an exception. *McFarland v. Claypool*, 397.

**BILL OF EXCEPTIONS.**

3. *Whether necessary.* If a defendant in ejectment desires to raise the question of the competency of the plaintiff's evidence of title, he must incorporate the same into the bill of exceptions, showing an objection thereto and exception to the ruling of the court in admitting the same, and assign cross-errors when the other party appeals, otherwise this court must presume in favor of the ruling of the trial court. *Village of Auburn v. Goodwin et al.* 57.

4. *What it should contain—of instructions not copied into the bill.* Where instructions given on the trial of a cause are not written into the bill of exceptions, they can not be considered in this court. In this case, the original bill of exceptions was brought up by agreement, but the instructions were not copied therein, though they were sent up with the transcript: *Held*, that they could not be treated as part of the record. *Chicago, Milwaukee and St. Paul Ry. Co. v. Harper*, 384.

5. *In what courts allowable.* At common law, a bill of exceptions could not be taken in case of a felony, and it is, by our statute, only authorized to be taken on trial at *nisi prius*; and there is no authority, common law or statutory, authorizing the Supreme Court, or any member of it, to sign a bill of exceptions. *Fielden et al. v. The People*, 595.

**EXECUTION.****CONTINGENT REMAINDER.**

1. A contingent remainder is not subject to sale on execution against the party entitled to the same. *Harvard et al. v. Peavey*, 430.

**FELLOW-SERVANTS.** See **MASTER AND SERVANT**, 3.

**FIXTURES.****PORTABLE ENGINE AND SAW-MILL.**

1. The owner of a portable engine and saw-mill sold the same to a party, who moved the machinery, and set it up on his wife's land, and the purchaser and his wife gave their mortgage on the land for the price of the engine, mill, etc. The mill was placed upon sills, and attached to stakes driven into the ground, so as to render it stationary while being operated. The engine was sunk into the ground and a shed built over it: *Held*, that the property did not acquire the character of fixtures, so as to become a part of the realty, and pass to the mortgagee. *Long v. Cockern et al.* 29.

2. The vendor of the engine and saw-mill, after the purchaser had set up the same on his wife's land for use, the land being mortgaged for the price, brought replevin for the engine and mill as personal property, which was afterward dismissed, and after a return of the property, the purchaser sold the same, in good faith, to a creditor: *Held*, that the institution of the replevin suit by the vendor, if it did not estop him to claim the property as part of the realty, afforded very strong evidence against him that the property was not real estate. *Ibid.* 29.

**FOREIGN INSURANCE COMPANIES.** See **INSURANCE**, 1, 2, 3.

**FORMER DECISIONS.****TOWN PLAT.**

1. *Certificate of officer.* The case of *Gebhardt v. Reeves*, 75 Ill. 305, in so far as it holds that the certificate to the survey and plat of a town or addition thereto may be legally made by a surveyor other than a county surveyor, under the statute of 1845, and in so far as it holds that the acknowledgment and recording of a town plat vests the fee to streets and alleys in the municipality regardless of a compliance with the requirements of the statute as to the survey, plat and certificate of a county surveyor thereto, is in conflict with *Trustees v. Walsh*, 57 Ill. 360, and *Thomas v. Eckard*, 88 id. 596, and is overruled. *Village of Auburn v. Goodwin et al.* 57.

**CHANGING BOUNDARIES OF TOWNS, ETC.**

2. The cases of *Dolese v. Pierce*, 124 Ill. 140, and *Village of Hyde Park v. City of Chicago*, id. 156, held, that section 12 of article 3 of the Township act of 1874, as amended in 1887, in so far as it attempted to authorize a change in the boundaries of incorporated cities and

**FORMER DECISIONS. CHANGING BOUNDARIES OF TOWNS, ETC. *Continued.***

villages, was in violation of section 13 of article 4 of the Constitution, and therefore void. But the question of the validity of that law in providing for a change in the boundaries of towns by taking territory from one and annexing the same to another, was not involved. *Donnersberger v. Prendergast et al.* 229. See TOWNSHIP ORGANIZATION, 1, 2, 3.

**FRANCHISE.****WHAT CONSTITUTES A FRANCHISE.**

1. The privilege or right to be a corporation is a franchise. *The People et al. v. O'Hair et al.* 20.

**QUO WARRANTO TO QUESTION RIGHT.**

2. *Against whom.* See PARTIES, 3.

**WHETHER FRANCHISE INVOLVED.**

3. *On appeal or error.* See APPEALS AND WRITS OF ERROR, 14.

**FRAUD.****BUILDING ASSOCIATIONS.**

*Fraud—representations to induce one to become a member.* See BUILDING ASSOCIATIONS, 4.

**FRAUD AND DECEIT.****IN THE PURCHASE OF GOODS ON CREDIT.**

1. The representation of a person that he wished to purchase goods on credit can not be said to be false, when he does, in fact, make such a purchase. The representation that he will pay the price at the termination of the credit is simply a promise to pay, and his subsequent inability to discharge his obligation does not render him liable to an action for fraud and deceit. *The People ex rel. Ellis et al. v. Healy, Clerk,* 9.

2. Representations and promises of payment by a purchaser on credit, even if he at the time does not intend to pay, is but an unexecuted intention, which, of itself, does not constitute an actionable fraud. A promise to perform an act, though accompanied with an intention not to perform, is not such a representation as can be made the ground of an action at law, as for fraud. The party should sue upon the promise. *Ibid.* 9.

3. It is not enough, to maintain an action by the vendor of goods for fraud and deceit, that the purchaser knew himself at the time to be insolvent, and had no reasonable expectation of paying for the goods. It is, however, true, that the purchase of goods by one who at the time intends never to pay for the same, is such a fraud as will entitle the vendor to rescind the sale and reclaim the property, although there were no fraudulent representations or false pretenses. *Ibid.* 9.

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**FREEHOLD.****WHETHER A FREEHOLD INVOLVED.**

*And what is meant by the word "freehold."* See APPEALS AND WRITS OF ERROR, 15 to 18.

**HOMESTEAD.****WHAT WILL DEFEAT THE RIGHT.**

1. *Effect of transfer of note given for purchase money—fraudulent acts.* A person purchased a house and lot, giving his promissory note for the purchase money, after which he conveyed the premises to his wife, from which time the property was occupied by them both as their homestead. It was of less value than \$1000. A third person, at the husband's request, bought the note given for the purchase money. It was held, that the purchaser of the note acquired no equity as against the wife's homestead. Even if she had owed the note herself, and had requested such third party to pay the same, his doing so could have given him no right as against her estate of homestead. *Gruhn v. Richardson et al.* 178.

2. Even the fraudulent acts of the party entitled to a homestead are not allowed to divest that right. *Ibid.* 178.

**HUSBAND AND WIFE.****MONEY OF THE WIFE.**

1. *Husband's right thereto.* Prior to the Married Woman's act of 1861, the husband had the right to reduce his wife's money and personal property into possession, and upon doing so, he would become the absolute owner of the same. A loan of money by a wife to her husband before that act took effect, made him the owner thereof. *Stewart et al. v. Fellows et al.* 480.

**ESTATE OF HUSBAND IN WIFE'S LAND.**

2. *At common law—of the estate during coverture—and estate by the courtesy—Married Woman's act of 1861.* At the common law, a husband held, in right of his wife, all her lands in possession, and owned the rents and profits thereof absolutely. The birth of issue was not necessary to this right of the husband, which continued during the joint lives of the husband and wife. It was called an estate during coverture, or the husband's freehold estate *jure uxoris*. *Bozarth et al. v. Largent*, 95.

3. This estate of the husband in his wife's lands differed from courtesy initiate in its being a vested estate in possession, while the latter is a contingent future estate, dependent upon the birth of issue. It was held in right of the wife, and was not added to or diminished when courtesy initiate arose. Subject to the husband's beneficial enjoyment during coverture, the ownership remained in the wife, and on dissolution of the marriage the property was discharged from such estate of the husband. *Ibid.* 95.

**HUSBAND AND WIFE. ESTATE OF HUSBAND IN WIFE'S LAND. *Continued.***

4. Where there was marriage, seizin of the wife and birth of issue capable of inheriting, the husband, by the common law, took an estate in the wife's lands during coverture. This was an estate of tenancy by the courtesy initiate, which would become consummate upon the death of the wife in the lifetime of the tenant. Upon the death of the wife, a tenant by the courtesy was seized of an estate of freehold, which was subject to alienation, and was liable to be taken on execution for his debts. *Bosarth et al. v. Largent*, 95.

5. The effect of the Married Woman's act of 1861 was to abrogate the husband's estate in his wife's lands, or the estate he would have had at common law during the coverture, when the marriage took place after that act took effect, and, consequently, during the coverture he would have no estate therein liable to execution or attachment. This act did away with the estate he would have had, at common law, growing out of the marital relation. *Ibid.* 95.

6. The general effect of statutes of this kind is to destroy the marital rights of the husband in his wife's estate, but a statute may exempt her property from his debts without in any way destroying his rights therein. Unless tenancy by the courtesy is destroyed by the statute by express words or necessary implication, or by the wife's disposition of her property by virtue of her power over it, the husband will be held to have an estate by the courtesy at her death. *Ibid.* 95.

7. The purpose and effect of the Married Woman's act of 1861 were to secure to the wife the control of her separate property during coverture, during which time the husband's common law rights in her property are suspended. It did not destroy the estate of courtesy, but after the passage of that act, and prior to the passage of the act of 1874, the husband, on his wife's death, leaving issue of the marriage, took a life estate in her land as tenant by the courtesy. *Ibid.* 95.

8. Where a marriage took place in 1863, the wife having lands inherited from her father, and she died in 1868, leaving issue of the marriage, it was held, that on her death the husband took a life estate in her land, which was subject to sale on execution against him. *Ibid.* 95.

**CONTRACT RELATIONS.**

9. Although the statute has so far changed the common law that a wife can now contract with her husband, and has abolished his estate in her lands during coverture, it has not denied to either all interest in the property of the other. The husband is still the head of the family, and the expenses of the family and of the education of the children are chargeable upon the property of both, or either of them, in favor of creditors. The husband still has an interest in his wife's real estate. *Tyler et al. v. Sanborn et al.* 136.

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**IMPRISONMENT.****JUDGMENT DEBTOR.**

1. *Of a second imprisonment for same cause.* Where a judgment debtor has been discharged from imprisonment on a *ca. sa.*, in due form, upon the ground that the process was issued in a case not involving a tort, he can not again be imprisoned on an *alias* writ issued in the same cause, and the issue of another writ of *ca. sa.* will not be compelled by *mandamus*, for the reason such a writ would be void if issued. *The People ex rel. Ellis et al. v. Healy, Clerk*, 9.

**INFANCY.****BOND FOR COSTS.**

*In suit in behalf of minor—at what stage of the suit it may be filed.*  
See COSTS, 3.

**INJUNCTIONS.****DIVERSION OF SURFACE WATERS.**

1. *An injunction is the proper remedy* to prevent the wrongful diversion of surface water upon the lands of another. In such case, the damages thereby occasioned are continuing or often recurring, and difficult of computation, and therefore an injunction is the only adequate remedy. *Dayton v. Drainage Comrs.* 271.

**INSANE PERSONS.**

**INSANITY OF CO-PARTNER.** See PARTNERSHIP, 1 to 7.

**INSOLVENT DEBTORS.****FOREIGN ASSIGNMENT.**

1. *How far enforceable here—as between foreign and domestic creditors.* In the absence of domestic creditors, the assignee, under a valid foreign assignment of a debtor, may reduce to his possession the property and collect the debts assigned to him, situated in this State; and debtors here, owing the assignor and having no set-off, will be compelled to pay the assignee. But in case the foreign assignment, if made here, would be set aside as fraudulent, or as contrary to the policy of our laws, our courts will not enforce it as against attaching creditors, whether foreign or domestic, although it may be valid in the State where made. *Woodward et al. v. Brooks et al.* 222.

2. Although a voluntary foreign assignment, valid in the State where made, is enforced in this State as a matter of comity, yet our courts will not enforce it to the prejudice of our own citizens, who may have demands against the assignor. It is contrary to the policy of our laws to allow the property of a non-resident debtor to be

**INSOLVENT DEBTORS. FOREIGN ASSIGNMENT. *Continued.***

withdrawn from this State, and thus compel creditors here to seek redress in a foreign jurisdiction; but for all other purposes, and between the citizens of the State where the assignment is made, if valid by the *lex loci*, it will be carried into effect by our courts. *Woodward et al. v. Brooks et al.* 222.

**INSTRUCTIONS.****OF THEIR QUALITIES.**

1. *As to a question of fact.* Where there is proof, in an action against two railway companies, that an agent, guilty of negligence, was employed and paid by both companies, and operated a semaphore or signal in the interest or service of both companies, it is proper to refuse an instruction that such agent was not the agent of one of the companies, but was that of the other company. *Chicago and Northwestern Ry. Co. v. Snyder*, Admx. 655.

2. *Erroneous instruction—whether cured by others.* In a case where the evidence is conflicting, the law should be given to the jury with substantial accuracy. An erroneous instruction can not be said to be cured by proper instructions on the other side, when, from the evidence, it is impossible to say that the jury did not follow the erroneous one. *Kankakee Stone and Lime Co. v. City of Kankakee*, 173.

**INSTRUCTION CONSTRUED.**

3. *On trial by jury in chancery—whether substituting new issues.* On bill in chancery to set aside a deed and a contract, on the ground of incapacity in the maker to transact business, and fraudulent and false representations, the court instructed the jury, that if either of these grounds was sustained, the allegation of the bill that said instruments were wrongfully and improperly obtained was made out: *Held*, that this was in no sense a substitution of new issues, but an instruction properly informing the jury as to what facts must be found to entitle the complainant to a verdict upon the issues already submitted. *Hoobler et al. v. Hoobler*, 645.

**INSURANCE.****FOREIGN COMPANIES.**

1. *Reciprocal burdens—when section 29 of the Insurance law of 1874 becomes operative.* The provisions of section 29 of the Insurance law of 1874, requiring insurance companies of other States having an agency in this State, to make the same deposits and to pay to the Auditor the same taxes, fines, penalties and license fees as is or may be required by the laws of such other State of such companies organized under the laws of this State to be paid, apply and become operative from the time of the enactment of such laws.

**INSURANCE. FOREIGN COMPANIES. *Continued.***

by such other States requiring companies of this State to make deposits or pay fines, taxes, penalties or license fees, whether any company of this State shall have established agencies there, or not. *Germania Ins. Co. v. Swigert, Auditor*, 237.

2. The time when our law requires a foreign insurance company doing business in this State to pay the same license fees, etc., required by the laws of the foreign State of companies of this State doing business therein, is whenever the existing or future law of such other State shall require companies of this State to pay license fees, etc., for the privilege of doing an insurance business therein. *Ibid.* 237.

3. *Insurance law of the State of Louisiana—in respect to foreign agencies.* In the statute of the State of Louisiana, which requires insurance companies organized under the laws of other States, and having agencies in that State, to pay an annual license of \$400, the words, "and having agencies in this State," are plainly but a part of the description of the subject matter upon which the law is to operate, and are not a statement of the time when the law is to exist or be in force. *Ibid.* 237.

**FOREIGN AGENCY OF HOME COMPANY.**

4. *Report to the Auditor.* There is no statute in this State requiring insurance companies organized under our laws to make a report to the Auditor whenever they establish agencies in foreign States, of that fact. *Ibid.* 237.

**INTEREST.****WHETHER ALLOWABLE.**

1. *Appraised value of improvements on leased premises.* By the terms of a lease the lessor was to purchase, on the expiration of the term, improvements which might be put upon the premises by the lessee, their value to be determined by appraisers to be chosen by the parties: *Held*, the sum found by the appraisers for the value of the improvements was a debt evidenced by the terms of the lease, and, as such, would draw six per cent interest from the date of the appraisement. *Pearson v. Sanderson*, 88.

2. *On money advanced on debtor's request.* Where A, at the request of B, paid off the note of the latter given for the price of a lot, and, by consent, took the deed from the vendor as security, and also took up B's note, unindorsed, bearing ten per cent interest, and the parties treated the money so paid as an advance on open account, it is error for the court, in finding the sum due from B, to allow any greater rate of interest than six per cent. In such case, B's liability is on an account, and not on the note so paid. *Stewart et al. v. Fellows et al.* 480.

**INTEREST. WHETHER ALLOWABLE. *Continued.***

3. *As between partners—on settlement.* Interest is not allowable on the settlement of partnership accounts, where no unreasonable delay or improper use of the partnership funds is shown. *Brownell v. Steere*, 209.

**INURING OF TITLE.****TO A MORTGAGEE.**

1. *Of an estate by the curtesy.* A husband and wife in 1868 executed their mortgage on the lands of the latter, the former having no present estate in the premises. The mortgage contained covenants of good right to convey, seizin in fee, and of general warranty. The wife shortly afterward died, leaving issue of the marriage, so that the husband succeeded to an estate as tenant by the curtesy for life: *Held*, that under the covenants in the mortgage his life estate inured to the benefit of the mortgagee, and passed under a sale under a decree of foreclosure of the mortgage. *Bozarth et al. v. Largent*, 95.

**INVERSE ORDER OF ALIENATION.****APPLICATION OF THE RULE.**

1. *In the case of a prior mortgage.* The owner of certain lots of land, numbered 4 and 5, subject to a trust deed on them and other property, sold lot 5 to A, and afterward sold lot 4 to B. A afterwards sold and conveyed lot 5, as follows, and in the order indicated: to C the north part thereof, to D the south part, and, lastly, to E the middle part: *Held*, that if lot 5 were sold without conditions, lot 4, subsequently conveyed, would be first charged with the whole sum due on the trust deed, and after it should be exhausted, the subdivisions of lot 5 would be liable in the inverse order in which they were conveyed by A. *Moore v. Shurtleff et al.* 370.

2. The general rule of inverse order, above stated, is never applied when the parties, by an agreement in their deed, have charged a mortgage upon land in a different manner,—as when, by the terms of the sale of a part of the premises, the mortgage is made a common charge, or the part conveyed is subjected to a proportionate part of the incumbrance. In such case, if there be no specific agreement as to the proportion which each part is to bear, contribution must be made according to the relative value of each part. *Ibid.* 370.

**OF AN AGREEMENT.**

3. *As to liability of separate parcels sold.* A sold to B his interest in lot 5, which, with lot 4, was subject to a deed of trust, together with other land. A's deed provided that the sale was subject to the deed of trust of \$2000, to secure the payment of which, ten acres of other land had been set aside, by decree of court, to be sold, and

**INVERSE ORDER OF ALIENATION. OF AN AGREEMENT. *Continued.***

the proceeds applied on the debt; that after the sale of said ten acres, and application of the proceeds, A was to further protect B to the amount of \$200 against the trust deed, and no more, B to pay any excess due thereon over the proceeds of the ten-acre tract, and said \$200; that if the proceeds of the ten acres should be more than was required to satisfy the deed of trust, the excess should be paid to A, and that said B "hereby agrees to save and forever keep the said grantor harmless from the payment of any sum by reason of said trust deed, other than herein provided." After this sale, A sold lot 4 to C, and B subdivided and sold and conveyed lot 5 in three parcels: *Held*, that by the stipulation or agreement in A's deed to B, it was the intention of the parties, that instead of lot 5 being held *pro rata*, as it would have been under the first clause, it should be held only liable to the extent, but no further, than the mortgage debt should exceed the proceeds of the ten acres, and \$200. *Moore v. Shurtleff et al.* 370.

**JUDGMENT CREDITOR.**

**REDEMPTION BY JUDGMENT CREDITOR.** See **REDEMPTION, 1 to 7.**

**JUDGMENTS AND DECREES.****EXTRA-TERRITORIAL EFFECT OF DECREE.**

1. *As to property in another jurisdiction.* Where a court of equity has jurisdiction over the person of a defendant, it may make its decrees and orders affecting his property which is situated outside of its jurisdiction, and enforce obedience to them by imprisonment. *Sercomb v. Catlin, Receiver,* 556.

**JUDGMENT FOR TAXES.**

2. *How far conclusive.* See **TAXATION AND TAX TITLES, 12.**

**JURISDICTION.****BY CONSENT.**

1. *It is a maxim in the law, that consent can never confer jurisdiction;* by which is meant that the consent of the parties can not empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and, upon considerations of public policy, defines and limits their jurisdiction, and this can neither be enlarged nor restricted by the act of the parties. *Harris v. The People,* 585.

**TRIAL BY JURY—IN CRIMINAL CASES.**

2. *Waiver thereof—so as to give jurisdiction to the judge to try a case without a jury.* See **CRIMINAL LAW, 1 to 4.**

**IN CHANCERY.**

3. *As to bill to quiet title.* See **CHANCERY, 28.**

**JURY.****DISCHARGE OF JUROR PENDING TRIAL.**

1. *For supposed prejudice.* When a juror was accepted, it did not appear that he was in any manner prejudiced against the defendant. During the trial, however, he assumed to cross-examine some witnesses, but there was nothing in the nature of the questions to show that he had become incompetent to discharge the duty of a juror. The defendant's counsel moved the court to exclude the juror from the panel, which the court refused: *Held, no error in overruling the motion. Chicago, Milwaukee and St. Paul Ry. Co. v. Harper*, 384.

**TRIAL BY JURY.**

2. *In chancery.* See CHANCERY, 24 to 28.
3. *Waiver thereof in criminal cases.* See CRIMINAL LAW, 1 to 4.
4. *Waiver thereof—in proceeding under Eminent Domain act—as to preliminary facts.* See EMINENT DOMAIN, 1.

LACHES. See LIMITATIONS, 3, 4, 5.

**LANDLORD AND TENANT.****PURCHASE OF IMPROVEMENTS BY LESSOR.**

1. *Upon appraised value, under the lease.* A lease of property for a term of years provided that on the expiration of the term without a purchase by the lessor of improvements which might be put upon the premises by the lessee, one appraiser should be chosen by each of the parties thereto, who should appraise the then cash value of the permanent improvements made by the lessee and remaining upon the leased premises, and that in the event of the two appraisers failing to agree upon values they should select a third person, and that the valuation fixed by any two of the three appraisers should determine the amount to be paid the lessee by the lessor, after giving the latter credit and paying all liens due him from the lessee for money advanced, unpaid rent and other indebtedness due or to become due from the lessee to the lessor. The parties each selected an appraiser, who, being unable to agree, selected a third one. Two of the three made an appraisal: *Held, in an action by the lessee against the lessor, to recover the appraised value, that the court properly instructed the jury that the defendant was liable for such valuation of all the permanent improvements put on the premises and remaining thereon at the end of the term. Pearson v. Sanderson*, 88.

**LAW AND FACT.****AS TO THE EFFECT OF A DEED.**

1. The effect of a deed is a question of law for the court; but whether there is an instrument purporting to be a deed conveying

**LAW AND FACT. AS TO THE EFFECT OF A DEED. Continued.**

a particular tract of land, is a question of fact, *Strean et al. v. Lloyd et al.* 493.

**EMINENT DOMAIN.**

2. *Offer of petitioner to perform certain duties, etc.—its binding character—as a question of law or fact.* See EMINENT DOMAIN, 7 to 11.

**WHO ARE FELLOW-SERVANTS.**

3. *As a question of law.* See MASTER AND SERVANT, 3.

**LEX LOCI—LEX FORI. See CONTRACTS, 2.****LIENS.****MECHANIC'S LIEN.**

1. *Strict construction.* The statute giving a mechanic, material-man or sub-contractor a lien on the premises of the owner of a building erected or repaired, is in derogation of the common law, and is to be strictly construed. Therefore, a party seeking a lien under its provisions must show a clear compliance with all the requirements of the statute. *Butler & McCracken v. Gain*, 23.

2. *Rights of sub-contractor, material-man, etc.—notice to owner.* The statute does not give to a sub-contractor, mechanic, or person furnishing material to the original contractor, a lien absolutely, without notice to the owner of the rights of such sub-contractor, mechanic or material-man. The statute requires such persons claiming a lien, to give the owner notice thereof, when he has not received the same from the contractor. *Ibid.* 23.

3. This notice is required to be served on the owner within forty days from the completion of the sub-contract, or within the same period after payment should have been made to the sub-contractor, etc. *Ibid.* 23.

4. If the contractor furnishes the owner with a sworn statement, setting forth the names of all persons entitled to be protected, with the sums due or to become due them, then all the purpose intended by the notice in section 30 is accomplished, and the sub-contractor or material-man will not be required to serve the notice provided for in the latter section. *Ibid.* 23.

5. If the owner of a building has notice of the rights and interests of sub-contractors and material-men, either under section 30 or 31, or from the sworn statement of the original contractor, and pays the original contractor, without retaining a sum sufficient to satisfy the claims of the sub-contractors, etc., such payment will be in violation of the rights of sub-contractors, etc. If the owner is not so served within forty days, he may lawfully pay off his contractor without liability to any other lienholder. *Ibid.* 23.

**LIENS. MECHANIC'S LIEN. *Continued.***

6. *Of the estate or interest to which the lien may attach.* The statute gives a mechanic's lien for labor or materials upon any estate or interest the owner may have in the premises at the time of making the contract. The statute gives the lien against a party in possession claiming to own the title, and it is not necessary to show the title any further, in order to create the lien. *Chisholm v. Williams et al.* 115.

7. *Time of payment—extension thereof.* To give a party furnishing labor and materials in the erection of a building a lien upon the premises, the contract must provide for payment within one year from the time stipulated for the completion thereof. If the price is to be paid within that time, a lien attaches, and it will not be lost by a subsequent extension of the time of payment. *Ibid.* 115.

8. *Evidence of indebtedness—to be produced.* The petitioner for a mechanic's lien is bound, on the hearing before the master, or upon the hearing in court, to make out his right to the lien, and for that purpose to produce the original notes given to him, or to account for their non-production. A stipulation that at the time of the filing of the bill the notes, as charged in the bill, were unpaid, and that said notes were dated and due for the amounts as charged, will not obviate the necessity of producing the notes on the hearing. *Kankakee Coal Co. v. Crane Bros. Manf. Co.* 627.

**VENDOR'S LIEN.**

9. *Not assignable—lost by transfer of debt.* The right to enforce a vendor's lien is personal, and is therefore not transferable. It ceases to exist when the vendor sells and indorses the note representing the purchase money, although the transfer is made with the consent or upon the advice of the debtor. *Gruhn v. Richardson et al.* 178.

**LIEN OF AN ATTORNEY AT LAW.**

10. *And of a lien in favor of different firms.* See ATTORNEY AT LAW, 2, 3, 4.

**PROTECTING TRUST ESTATE.**

11. *Equitable lien in favor of trustee.* See TRUSTS AND TRUSTEES, 3, 4.

**LIMITATIONS.****LIMITATION ACT OF 1839.**

1. *Payment of taxes—of an illegal tax.* In order to establish title by limitation under the act of 1839,—section 8 of the Revised Statutes of 1845,—the person in possession of the premises under color of title is required to pay all taxes *legally* assessed on the property for seven successive years. He is not required to pay a void tax. *Grant v. Badger et al.* 386.

**LIMITATIONS. LIMITATION ACT OF 1839. *Continued.***

2. In 1873 the legislature passed an act for the levy and collection of city taxes, under which a lot was taxed \$5.70, which sum the holder of color of title paid. The courts having adjudged the act unconstitutional, in 1877 the legislature authorized the levy and collection of uncollected back taxes, requiring credit to be given to those who had paid the prior illegal levy. Under this act the city levied a tax on the lot of \$6.15, which included forty-seven cents of an illegal tax, being for interest on void city bonds: *Held*, that the amount paid the city in 1874 was a payment under the act of 1877, and that the holder of the color of title was not bound to pay the illegal tax for interest on city bonds. The credit allowed by the act of 1877, in such case must be taken as applied on the valid taxes, and not on a void tax. *Grant v. Badger et al.* 386.

**LAPSE OF TIME ASIDE FROM THE STATUTE.**

3. *Laches—knowledge of the facts, essential.* Where the facts relied on to set aside a trustee's sale of property under a power in a trust deed are not discovered until after the filing of the original bill, and they are, when discovered, set up by an amended bill, *laches* will not be imputable to the complainant. *Williamson et al. v. Stone et al.* 129.

4. *Delay in attacking an accounting and settlement between surviving partners and the administrator of a deceased partner.* An unexplained delay of nearly six years after the settlement of a partnership between the surviving members and the administrator of a deceased partner, during which time one of the surviving partners has died and the situation of the others has materially changed, and more or less of the evidence by which the true state of the accounts of the firm could be established has disappeared, will constitute such *laches* as will bar the widow and heirs of the deceased partner, and their assignee, of their right to attack such accounting and settlement as fraudulent and collusive. *Winslow v. Leland, Admr. et al.* 304.

5. *Laches to defeat a specific performance.* Where the purchaser of land in 1863 was let into the immediate possession, and occupied and improved the premises up to his death, in 1867, and his widow and heirs continued in such possession for twenty years or more, it was held, on bill by the widow and heirs for a specific performance of the contract, that the defense of *laches* could have no application. *Bragg v. Olson et al.* 540.

**MARSHALING ASSETS.****OF SUCCESSIVE CONVEYANCES.**

*Held under a common lien.* See INVERSE ORDER OF ALIENATION, 1, 2, 3.

**MASTER AND SERVANT.****RESPONDEAT SUPERIOR.**

1. *Generally.* Where the relation of master and servant exists between a city railway company and a person whose act may be the cause of an injury to another, the company will not be liable, if the servant, in causing the injury, is not acting within the scope of his employment; but the master will be responsible, when the servant acts within the general scope of his employment, for acts done while engaged in his master's business, with a view to the furtherance of that business, by which injury is caused to another, whether negligently or wantonly committed. *North Chicago City Ry. Co. v. Gastka*, 613.

2. *Ejecting passenger from street car—without due care on the part of the servant.* If a person is a trespasser upon a street railway car, or is unlawfully riding thereon without the payment of fare, and the conductor undertakes to remove the intruder, he must act in a prudent manner, and exercise due care for the safety of such person; and if he fails to do so, and in consequence thereof such person is injured, the railway company will be liable for the injury. *Ibid.* 613.

**FELLOW-SERVANTS.**

3. *As a question of fact for the jury.* In an action against a railway company, to recover for the death of a conductor on the defendant's road, caused by the negligence of another servant in charge of a semaphore, the defendant asked, and the court gave, an instruction embodying the rule as to the liability of a master to one servant for an injury caused by the negligence of a fellow-servant, which was numbered 1. The defendant asked the court to submit this question: "At the time of the accident causing S.'s death, did the usual duties of S., and T., the semaphore attendant, bring them habitually together, so that they could exercise a mutual influence upon each other promotive of proper caution." The court submitted the same, with this addition: "So as to make them co-employees in the same line of employment, as explained in defendant's instruction No. 1." *Held*, no error in the modification of the question, as it did not require the jury to pass upon the law. *Chicago and Northwestern Ry. Co. et al. v. Snyder*, Admx. 655.

**MEASURE OF DAMAGES.****IN ACTION FOR PERSONAL INJURY.**

1. *Resulting from negligence.* In an action to recover for a personal injury caused by negligence, it is not competent for the plaintiff to prove what he had made in business prior to his injuries. What any business man, however competent and skilled, might make in the future in any kind of trade, is too much a matter of

**MEASURE OF DAMAGES. IN ACTION FOR PERSONAL INJURY. *Continued.***

speculation and contingency to be susceptible of direct evidence. *Fisher et al. v. Jansen*, 549.

2. A party personally injured from negligence, may recover of the defendant damages for his inability to labor or transact business in the future, resulting from his injuries, without any evidence of his success in business prior to his injury, or the extent of his earnings. Direct proof of any specific pecuniary loss is not indispensable to a recovery. *Ibid.* 549.

3. In an action by a plaintiff aged about fifty-three years, and temporarily not engaged in business, to recover for personal injuries inflicted through negligence, the court instructed for the plaintiff, in substance, that if the jury found, from the evidence, that the plaintiff was entitled to recover any damages, the jury had a right to and should take into consideration all the facts and circumstances in evidence before them, and that they might consider the nature and extent of the plaintiff's injuries, if any, testified about by the witnesses; his pain and suffering, if any, resulting from such injuries; the permanent disability, if any, caused by said injuries; the money necessarily paid, if any, by the plaintiff in and about endeavoring to be healed or cured of said injuries; and any future pain or suffering, or future inability to labor or transact business, if any, that the jury may believe, from the evidence, the plaintiff would sustain by reason of injuries received. There was no direct proof of the earning ability of the plaintiff: *Held*, that there was no error in the instruction. *Ibid.* 549.

**ON BOND OF SURVIVING PARTNER.**

4. *To estate of deceased partner.* In an action upon the bond of a surviving partner, given to the administratrix of his deceased partner, for a neglect to apply the moneys realized from the firm assets to the discharge of the firm debts, the damages are not merely nominal, but a recovery may be had for the value of the performance of the undertaking. The measure will be the sum the estate of the deceased partner would have been released of by performance by the surviving partner. *Miller et al. v. Kingsbury*, 45.

5. Where the contract is more than for indemnity against damages, or when a party stipulates against the doing of certain acts or the existence of certain conditions, or for performance of any kind, then the value of the performance of the contract will measure the damages recoverable for the breach. *Ibid.* 45.

**UNDER EMINENT DOMAIN LAW.**

6. *Measure of damages—elements to be considered.* See **EMINENT DOMAIN**, 3 to 9.

**MECHANIC'S LIEN.** See **LIENS**, 1 to 8.

**MORTGAGES AND DEEDS OF TRUST.****A TRANSACTION TREATED AS A MORTGAGE.**

1. Where a purchaser of a lot of ground assigns his contract of purchase to another in trust, and the trustee advances the purchase money, when due, at the request of the *cestui que trust*, to save a forfeiture, and the vendor conveys the title to such trustee, and transfers to him the notes given for the price, by consent of the *cestui que trust*, as a security for the repayment of the sum so advanced, the transaction will, in equity, be treated as a mortgage, and it will not concern the *cestui que trust* to whom the money is decreed to be paid,—whether to the trustee or his devisee. *Stewart et al. v. Fellows et al.* 480.

**DEED OF TRUST—WITH POWER OF SALE.**

2. *The trustee as the representative of both parties.* Where a trust deed is made to secure a debt, the trustee named therein is the representative, not only of the owner of the debt, but also of the maker of the deed. He is the agent of both the creditor and the debtor. His duty is to act fairly toward both, and not exclusively in the interest of either. The law requires the conduct of such a trustee to be absolutely impartial, as between the two parties whom he represents. Hence, his relations with one of them ought not to be of such a character as to tempt him to neglect the interest of the other. *Williamson et al. v. Stone et al.* 129.

3. *Trustee fixing amount of bid.* It is not proper for a trustee appointed in a deed of trust, to direct the representative of the creditor what bid he shall make, but it is his duty to offer the property at public auction, in such a way as to make it bring the highest possible price, and to leave the parties to decide for themselves what they will offer for it. *Ibid.* 129.

4. *Setting aside trustee's sale—redemption—in equity.* A trustee after the sale wrote to the creditor: "We bid the property off for \$9000, and shall take judgment for the balance of about \$4000. \* \* \* My impression is, we had better get a quitclaim deed from Mr. S. (the debtor,) and, if you desire, will have one sent to him to sign. I did not bid the whole amount on the property, as I thought, by having four or five thousand dollars hanging over him, he would be more willing to give us a deed of the property." It appeared that the trustee was the confidential adviser and the business agent of the creditor, and employed one of his attorneys to bid on the property, and directed the amount of the bid at much less than the value of the property, for the purpose of forcing the debtor to make a deed: *Held*, that the action and conduct of the trustee were such as to require the setting aside of the sale and allowing a redemption. *Ibid.* 129.

5. A court of equity will always examine with the closest scrutiny a sale that is made under the power contained in a trust deed, and

**MORTGAGES AND DEEDS OF TRUST.****DEED OF TRUST—WITH POWER OF SALE. *Continued.***

when the rights of third persons have not intervened, redemption from such a sale, conditioned upon the full payment to the holder of the indebtedness of all that is due him, will be allowed, when there is evidence of any such unfairness on the part of the trustee, whether intentional or not, as has resulted in injury to the debtor. *Williamson et al. v. Stone et al.* 129.

**FORECLOSURE.**

6. *Allegations and proofs—as to removal of tax title by mortgagee.* A bill to foreclose a deed of trust alleged that the mortgagor, for himself, etc., covenanted that he and they would pay all taxes, etc., levied or assessed against the lands mortgaged until the mortgage debt was paid, but that owing to the neglect and default of the mortgagor or his assigns, a large amount of taxes and assessments are now due and owing on the premises and are a lien thereon, and that taxes and assessments have been allowed to go to judgment and sale, and deeds have been issued on said real estate, or a part thereof still remaining as security. To the bill was attached a copy of the trust deed, which provided that all payments by the holder of the notes should be added to the mortgage indebtedness: *Held*, that the allegations in the bill, taken with the trust deed, were sufficient upon which to predicate evidence of the complainant's payment of \$1000 with which to purchase an outstanding tax title. *Cheltenham Improvement Co. v. Whitehead*, 279.

**SOLICITOR'S FEES.**

7. *In whose favor allowable—clause in deed of trust construed.* A deed of trust given to secure notes, provided that on default of payment, etc., the trustee might, in his own name or otherwise, file a bill to foreclose, and further authorized such trustee to take from the proceeds of the sale under the foreclosure, five per cent thereof for solicitor's fees. A bill was filed to foreclose, by the holder of the notes, and the court allowed the same solicitor's fees as if the bill had been filed in the name of the trustee, for the reason that it mattered not to the mortgagor to which of the parties he paid the solicitor's fee. *Ibid.* 279.

**ALLOWANCE FOR ABSTRACT OF TITLE.**

8. The party foreclosing a deed of trust will not be entitled to have allowed, in addition to the debt, interest, costs and attorney's fees, for an abstract of title and expenses incurred in procuring date to foreclose, in the absence of any clause in the trust deed which, by reasonable construction, gives the right. A clause authorizing the trustee to pay "also all other expenses of this trust," will not authorize the court to charge the trust estate for such abstract, etc. *Ibid.* 279.

**MORTGAGES AND DEEDS OF TRUST. *Continued.*****CHATTEL MORTGAGES.**

9. *Not properly acknowledged.* A chattel mortgage not acknowledged as required by the statute, is void as to creditors and purchasers, notwithstanding actual notice. *Long v. Cockern et al.* 29.

**MUNICIPAL CORPORATIONS.****OF THEIR POWERS.**

1. *In general.* A municipal corporation can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. *Huesing v. City of Rock Island et al.* 465.

2. *General and special grant of powers—of the exercise thereof.* An express grant of the power to pass ordinances upon a particular subject, limited, by the terms of the grant, in respect to its extent or objects and purposes, or in reference to the mode in which the power is to be exercised, may be held, unless a contrary legislative intent is manifest, to exclude all authority to legislate upon that subject beyond the prescribed limits. *Ibid.* 465.

3. Where there are both special and general provisions as to the power of a city to enact by-laws, as, in respect to health and sanitary matters, the power to pass by-laws, under the special or express grant, can only be exercised in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws, under the general clause, does not enlarge or annul the power conferred by the special provisions in relation to their various subject matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority. *Ibid.* 465.

4. *Power in regard to sanitary matters—whether it extends to the erection and maintenance of public slaughter-houses.* Paragraph 78, of section 1, article 5, of the general Incorporation law, which declares that cities and villages shall have power "to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease," does not enlarge the sanitary powers conferred on cities in paragraphs 81 to 84, inclusive. *Ibid.* 465.

5. Under paragraphs 83 and 84, of section 1, article 5, power is conferred on incorporated cities and villages to prohibit slaughter-houses, or any unwholesome business or establishments, within the incorporation; and the common council, by appropriate ordinance, may regulate the location of unwholesome business, and they may cleanse, abate or remove the same. But this power does not author-

**MUNICIPAL CORPORATIONS. OF THEIR POWERS. *Continued.***

ize the passage of an ordinance appropriating public funds for the erection and maintenance of a public slaughter-house. *Huesing v. City of Rock Island et al.* 465.

6. So a city organized under the general incorporation law, has no power, either express or by implication, to pass an ordinance establishing a city abattoir or slaughter-house, and appropriate the funds or revenue of the city for its erection and maintenance. *Ibid.* 465.

**MUNICIPAL INDEBTEDNESS.****CONSTITUTIONAL LIMITATION.**

1. A city can not be held liable in tort for the simple refusal of its council to pay an indebtedness contracted in contravention of section 12, article 9, of the constitution, and thus recover in damages the precise amount of that indebtedness, with interest from the time it became due. *Prince v. City of Quincy,* 443.

2. The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution, to carry on their corporate operations, while so indebted, upon the cash system, and not upon credit, to any extent or for any purpose. *Ibid.* 443.

3. If an indebtedness of a city for current expenses and supplying water is forbidden, as being in excess of the constitutional limit, the contract upon which it arose, though in itself executory and creating only a contingent liability, is also forbidden. Prohibition of the end is prohibition of the direct, designed and appropriate means. *Ibid.* 443.

**NEGLIGENCE.****MASTER AND SERVANT.**

1. *Respondeat superior.* See **MASTER AND SERVANT**, 1, 2.

**FELLOW-SERVANTS.**

2. *Who are fellow-servants—as a question of law or fact.* Same title, 3.

**NEW TRIALS.****VERDICT AGAINST THE EVIDENCE.**

*On trial by jury in chancery.* See **CHANCERY**, 28.

**NOTICE.****MECHANIC'S LIEN.**

1. *Rights of sub-contractor, material-man, etc.—notice to the owner.* See **LIENS**, 2 to 5.

**POSSESSION OF LAND.**

2. *As notice of occupant's rights.* See **POSSESSION**, 1, 2, 3.

**NOTICE. *Continued.*****APPRAISAL OF IMPROVEMENTS.**

3. *Under the terms of a lease—of notice to the parties.* See ARBITRATION AND AWARD, 1.

**DRAINAGE ASSESSMENT.**

4. *Re-classification of lands—notice to owner.* See DRAINAGE LAW, 7.

**SALE OF PLEDGE.**

5. *Notice to redeem.* See PLEDGE, 1 to 4.

**NOTICE OF TAX SALE.**

6. *And time of redemption.* See TAXATION AND TAX TITLES, 7, 8, 9.

**PARENT AND CHILD.****ADVANCEMENT.**

*Can not rest in parol.* See ADVANCEMENT, 1, 2, 3.

**PARTIES.****IN WHAT CAPACITY TO SUE.**

1. *As, in case of contracts with executors, etc.* An executor or administrator may sue as such, as well as in his own name, upon a contract made with him in his representative capacity. In either case, the sum recovered will be held to be for the benefit of the estate. *Miller et al. v. Kingsbury*, 45.

2. A surviving partner gave his bond, with sureties, to A B, administratrix of the estate of C D, the deceased partner, or to her successor or successors, conditioned for the faithful discharge of his duties as such surviving partner, etc.: *Held*, that the words following the name of the obligee were merely *descriptio persona*, and might be treated as surplusage, and that she might maintain an action for a breach of the conditions of the bond in her individual name. *Ibid.* 45.

**QUO WARRANTO.**

3. *Against whom.* Where the assumed right or franchise is denied, and is sought to be questioned by an information in the nature of a *quo warranto*, the writ is properly issued against those who are attempting to exercise the right or franchise. *The People et al. v. O'Hair et al.* 20.

**ASSESSMENT FOR TAXATION.**

4. *Who may complain.* See TAXATION AND TAX TITLES, 5.

**WANT OF PROPER PARTIES—IN CHANCERY.**

5. *Time to object.* See PRACTICE, 1.

**PARTITION.****REQUISITES OF THE BILL.**

1. *In setting forth the interests of all the parties.* A bill for the partition of land must set forth the interests of all the parties in the premises, as the court is required by the statute to find and declare the rights, title and interests of all parties. A bill which fails to do this is insufficient. *Prichard v. Littlejohn*, 123.

**CROSS-BILL.**

2. *Not appropriate or necessary.* A cross-bill is not an appropriate pleading in a suit in chancery for the partition of land. The defendant, by requiring the complainant to file a proper bill and specifically answering the same, may obtain all the relief he can on a cross-bill. But by answering the cross-bill the complainant treats it as a proper pleading. *Ibid.* 123.

**ALLEGATIONS AND DECREE.**

3. *Should correspond.* A cross-bill in a suit for partition averred that the complainant therein and one S. owned the premises as tenants in common, and showed that the complainant in the original bill had an interest in the land in common with the complainant in the cross-bill. The court, by its decree, found that the two complainants were tenants in common : *Held*, that there was a material variance between the cross-bill and the decree. *Ibid.* 123.

4. A cross-bill for the partition of land averred that the complainant was the owner of an undivided one-third interest in one of the tracts, and one S. of the other two-thirds, and this part of the bill was wholly disregarded in the decree : *Held*, that if it appeared on the hearing that the complainant in the original bill, and not S., was tenant in common with the complainant in the cross-bill, as the decree found, then the cross-bill should have been dismissed, unless it was amended so as to make it correspond with the proofs. *Ibid.* 123.

**COMMISSIONERS' REPORT.**

5. *Grounds of exception thereto.* A party to a proceeding for partition excepted to the commissioners' report of partition of land, on the ground that the interests of the parties were manifestly prejudiced by the partition as reported, and because the partition could not be made without manifest prejudice to the interests of the parties. No proof was introduced showing that the party complaining, or any other party, was injured by the partition : *Held*, that the court properly overruled the exceptions to the report. If any party was injured, the party objecting should make that fact appear. *Koehler v. Klein et al.* 393.

6. A ground of exception to the report of commissioners making partition was, that the map or plat referred to in the report did not show the size and dimensions of the several parcels, as indicated

**PARTITION. COMMISSIONERS' REPORT. *Continued.***

by the surveyor's figures thereon. The correctness of these figures was not disputed, they showing the distances of each line: *Held*, that the objection on account of the plat was frivolous and properly overruled. *Koehler v. Klein et al.* 393.

**PARTNERSHIP.****INSANITY OF A CO-PARTNER.**

1. *Effect upon the partnership relation—rights and duties arising therefrom.* The insanity of a partner does not, *per se*, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution. But this doctrine is applied, in equity, with appropriate limitations and restrictions, for while curable, temporary insanity will be sufficient, upon an inquisition, to sustain an adjudication of insanity in the county court, the appointment of a conservator, and commitment of the ward to an insane asylum, yet it will not authorize a court of chancery to decree a dissolution of a partnership if the malady be temporary, only, with a fair prospect of recovery within a reasonable time. *Raymond v. Vaughn*, 256.

2. An adjudication of insanity by the county court can have no effect in determining the partnership, and upon bill to dissolve the partnership it will have no other effect than to establish the insanity. Courts of equity will, as between the partners, look to the effect produced upon the partnership relations and business, and refuse to dissolve the partnership and apply its assets unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation. *Ibid.* 256.

3. The relation of a partner embraces the character of both principal and agent. As to the partnership concerns, for himself he acts as principal, and as agent for his partners. His power to act for them is coupled with an interest in all that pertains to the firm business. Therefore, if, for any reason, one member of the firm should assume control and management of the business and affairs of the partnership, he should, while so controlling it, manage it for all, and in the interest of all, the partners. He will not be allowed to derive personal advantage from the use of the partnership assets, or business or good will of the firm. *Ibid.* 256.

4. So where, after one of two partners had been adjudged insane, but his insanity was considered only temporary, and curable, and the other, without objection, or notice to any one, continued the business precisely as before, it was *held*, that the presumption was that he did not intend a dissolution of the firm, and, in the absence of evidence to the contrary, that he waited to determine whether the incapacity of his partner would prove temporary, merely, and it become practicable for him to resume business. *Ibid.* 256.

**PARTNERSHIP. INSANITY OF A CO-PARTNER. *Continued.***

5. In such case, as long as the sane partner thus continued to carry on the business without taking steps to dissolve the partnership, there could be no dissolution, or he be excused from afterward accounting for the profits actually derived by him from the business of the firm. *Raymond v. Vaughn*, 256.

6. *Accounting of conservator to county court—whether conclusive.* A and B were partners in this State in the business of brokers, and the former was adjudged insane and the latter appointed his conservator, and continued the business precisely as before. The conservator did not inventory the partnership matters, and the profits of the business thereafter were not embraced in the final account of the conservator. Upon his recovery, A filed a bill in chancery for an accounting of the partnership matters and profits: *Held*, that the final accounting of the conservator partner in the county court was no bar to the relief sought by the bill. *Ibid.* 256.

7. The judgment of the county court approving a conservator's account and discharging him, without any notice, actual or constructive, to the ward, who was at the time in a lunatic asylum, is not conclusive upon the latter or his personal representative. A claim can not be barred by a proceeding in which it was in nowise involved, and of which the party to be estopped had no kind of notice. *Ibid.* 256.

**DEATH OF A CO-PARTNER.**

8. *Retaining the old firm name—effect upon estate of deceased partner.* Where a partnership is dissolved by the death of a partner, the retention of the firm name by the survivor will create no liability on the estate of the deceased partner, and the survivor, by accepting a draft in the firm name, will make himself individually liable therefor. *Woodward et al. v. Brooks et al.* 222.

9. *Rights of persons in interest—assignable interest of distributees.* On the death of a partner, all rights and causes of action growing out of his dealings with the firms of which he was a member, and the right to an accounting with the surviving members of such firms, are by law vested in his administrator, and not in his widow and children, and they can not transfer to a third person the right to call on such surviving members for an accounting. *Winslow v. Leland, Admr. et al.* 304.

**SURVIVING PARTNER.**

10. *Of his duty.* It is the duty of a surviving partner to proceed without delay to convert the assets into money, and pay off the partnership debts. *Miller et al. v. Kingsbury*, 45.

11. *Of a bond given by a surviving partner to estate of deceased partner—construction—enforcing its provisions severally.* See CONTRACTS, 3, 4.

**PARTNERSHIP. SURVIVING PARTNER. *Continued.***

12. *Parties—in what capacity to sue upon such bond—whether individual or representative.* See PARTIES, 1, 2.

**COMPENSATION TO CO-PARTNER.**

13. *For services.* One partner can not charge the firm or his co-partner for his services in attending to the partnership business, unless there is a special agreement among the partners entitling him to do so. *Brownell v. Steere*, 209.

**REIMBURSING PARTNER.**

14. *For expenses in defending suit.* After the dissolution of a partnership a former clerk sued the firm for his services, and recovered judgment therefor. One of the partners defended the suit, and paid out certain moneys for costs and attorney's fees, which were not shown to be excessive or unnecessary: *Held*, that the amounts so paid were properly charged to the firm in stating the partnership account. *Ibid.* 209.

**SALE OF PARTNERSHIP STOCK.**

15. *To one of the partners—action of arbitrators.* On the dissolution of a firm an invoice of the stock on hand was taken, and it was agreed that arbitrators should offer the stock for sale to the two partners, and that the one bidding the larger amount should take the goods, and the price bid should be treated in the settlement of the partnership account the same as the goods, and the matter of the settlement was referred to the arbitrators. Their award was set aside: *Held*, on bill to adjust the partnership matters, that the setting aside of the award did not operate to vacate the sale, and that the purchaser was properly charged with the amount of his bid for the goods. *Ibid.* 209.

**PAYMENT.****RENEWAL NOTE.**

*Whether a payment of the prior note.* See RENEWAL NOTE, 1, 2.

**PLEADING.****OF THE DECLARATION.**

1. *In an action for fraud and deceit.* In an action to recover for fraud and deceit, the plaintiff must allege the facts relied on as constituting the fraud, and when false representations are relied on, it is essential that they relate to some material existing fact or facts, and not to the future intention of the defendant. The ground of liability in such cases rests upon the affirmation of some existing fact, which the party making knows, or has good reason to know, to be false. *The People ex rel. Ellis et al. v. Healy, Clerk*, 9.

2. In this case it was alleged in the declaration, that on, etc., the plaintiffs were possessed of certain goods, of the value of \$1000, and

**PLEADING. OF THE DECLARATION. *Continued.***

that "the defendant, falsely and fraudulently, and for the purpose of inducing the plaintiffs to part with the possession of said goods, represented to the plaintiffs that he desired to purchase said goods of the plaintiffs on credit, and that he would pay for said goods their reasonable value, and thereupon the plaintiffs, relying upon the said representations and promises of the defendant in that behalf, and believing the same to be true, sold and delivered the said goods to the defendant on credit; and said plaintiffs aver that said promises and representations of defendant were utterly false at the time they were made, and were so known to the defendant, and were made by him with the fraudulent purpose of obtaining possession of said goods without paying for the same, and that at that time defendant was wholly insolvent, and was fully aware of that fact, and knew, when he bought said goods, that he could not pay for the same as he agreed, and that defendant has never paid for said goods, and obtained the same from plaintiffs with the fraudulent purpose of not paying for the same, and of cheating and defrauding the plaintiffs out of said goods:" *Held*, that the declaration failed to show a cause of action arising out of a tort, so as to justify the issue of a *ca. sa.* against the body of the defendant. *The People ex rel. Ellis et al. v. Healy, Clerk*, 9.

**OF THE FORM OF ACTION.**

3. *As determining the nature of the cause of action.* As the form of action adopted will not necessarily determine the nature of the cause of action,—whether it is for a tort or breach of contract,—the allegations of the declaration will be looked to for the purpose of ascertaining whether the acts complained of constitute a tort, within the meaning of the statute allowing the imprisonment of the defendant by the writ of *capias ad satisfaciendum*. *Ibid.* 9.

**JOINDER OF COUNTS.**

4. *As to acts done by the principal, and by an agent.* In trespass by a passenger against a railway company, for expulsion from a train at a place not a regular station, for non-payment of fare, the first count charged that the trespass was committed by the defendant corporation, while the second averred that the defendant, by its conductor, committed the trespass: *Held*, no misjoinder of counts, as they both charge a trespass by the defendant. *Illinois Central Railroad Co. v. Latimer*, 163.

**LEAVE TO FILE AMENDED PLEADING.**

5. *Submitting proposed amendment for inspection.* A party who desires to file an amended pleading should prepare it, and submit it to the inspection of the court. He is not entitled, as of right, to an order giving him leave in advance to file it before it has even been drafted. There is, therefore, no error in refusing defendant's motion for leave to file an amended plea in abatement to an attach-

**PLEADING. LEAVE TO FILE AMENDED PLEADING. *Continued.***

ment, when the proposed plea is not prepared and submitted for inspection. *McFarland v. Claypool*, 397.

6. *Waiver as to judgment on demurrer.* Where a demurrer is sustained to a defendant's plea in abatement to a writ of attachment, and the defendant appears and asks leave to file an amended plea, it is questionable if he does not thereby waive his right to complain of the judgment upon the demurrer. *Ibid.* 397.

**PLEA IN ABATEMENT.**

7. *In attachment—requisites of the plea.* See **ABATEMENT**, 1.

**PLEADING AND EVIDENCE.****ALLEGATIONS AND PROOFS.**

1. *In chancery—proof of any one of several grounds of relief sufficient.* If, from the allegations in a bill to set aside a sale made by an agent, and the facts proved, the transaction is deemed fraudulent in law, it is immaterial whether the allegations of fraud in fact are proved or not. If any alleged ground of relief is shown by the evidence, it will be error to dismiss the bill. *Tyler et al. v. Sanborn et al.* 136.

2. *On bill to foreclose mortgage—as to removal of tax title by mortgagor.* See **MORTGAGES AND DEEDS OF TRUST**, 6.

**ALLEGATIONS AND DECREE.**

3. *Should correspond.* See **PARTITION**, 3, 4.

**PLEDGE.****SALE OF THE PLEDGE.**

1. *Before and after maturity—demand of payment—notice to redeem.* Ordinarily, when a pledge of property is made to secure the payment of indebtedness, the pledge can not be sold until after the debt is due and demand is made to redeem, and notice is given of the intention to sell. *National Bank of Illinois v. Baker*, 533.

2. Parties may, however, by contract, agree that in certain contingencies the pledge may be sold before the debt is due, or that it may be sold without previous notice, etc. But in such case, what is the contract must be determined from the language used, and not from a consideration of what would best subserve the interests of the creditor, for the law has no greater regard for his interest than it has for that of the debtor. *Ibid.* 533.

3. The rule at common law was, that the pledgee must give notice to the pledgor to redeem, before he could sell. The purpose of this notice was to terminate the indulgence and require the pledgor to protect his property, while notice of the sale is to invite competition and secure the best price attainable by a sale. *Ibid.* 533.

**PLEDGE. SALE OF THE PLEDGE. *Continued.***

4. Where the sale is only to be made in the event of failure to make payment at the maturity of the debt, it may be that the pledgor is not entitled to a demand of payment. But when the pledgee elects to sell the pledge before the debt is due, because of the happening of a contingency provided for by agreement, the pledgor is entitled to notice to redeem, and that the pledgee will not wait till the maturity of the debt. A sale without notice, in such case, will not pass the pledgor's right of redemption. *National Bank of Illinois v. Baker*, 533.

5. *Sale before maturity—in case of depreciation of pledge "in market value"—worthless stocks.* The makers of a promissory note deposited in pledge with the payee certain certificates of shares in a corporation, and also a life policy of insurance of one of the makers of the note, calling for \$5000. The certificates of stock proved to be counterfeits, and worthless. The contract of the parties provided, that on default of payment of the note at maturity the pledgee might sell the pledge, and also, "in the event of said security, or any part thereof, depreciating in market value," that the pledgee might, either before or after maturity of the note, sell the pledge, either at public or private sale, and waive any and all notice of the sale to the pledgors: *Held*, that the words "depreciating in market value," had no reference to the security of the certificates of stock, for, being worthless, their value could not depreciate; and that a sale by the pledgee before the maturity of his debt did not pass the absolute title, but that the pledgors might redeem the same by payment of the note when due. *Ibid.* 533.

**POSSESSION.****POSSESSION OF LAND.**

1. *As notice of occupant's rights.* Actual possession of land by a party under an unrecorded deed, is constructive notice of the legal and equitable right of the party in possession. Possession by a tenant is the same, in all respects, as if by the party himself. *Thomas et al. v. Burnett*, 37.

2. Actual residence by the owner or claimant of land is not essential to a continuous possession. If the party is in actual possession, and there are continuous acts of ownership, it is sufficient. The fact that a short time may elapse between the actual occupancy by one tenant before another tenant takes possession, will not lose the possession to the owner. *Ibid.* 37.

3. B bought a tract of land in 1882, but failed to record her deed until October 22, 1884. After the purchase, B retained C, the prior agent of her grantor, as her agent, who, in August, 1882, rented the premises to J. for one year. The tenant raised a crop thereon, and occupied the land till in August, 1884, when he surrendered his

**POSSESSION. POSSESSION OF LAND. *Continued.***

possession to C. The premises were again rented in March, 1884. On October 10, 1883, the property was attached as that of B's grantor: *Held*, that the possession of B was sufficient notice of her unrecorded deed, to the attaching creditor. *Thomas et al. v. Burnett*, 37.

**PRACTICE.****TIME TO OBJECT.**

1. *Want of proper parties—in chancery.* After a decree for the specific performance of a contract for the sale of land between the parties thereto, it will be too late to raise the question that the representatives of a third party, deceased, are necessary parties, no such question having been raised by demurrer, plea or answer in the court below. *Bragg v. Olson et al.* 540.

2. *As to admission of evidence.* In a proceeding to confirm a special assessment for the building of a sidewalk, an objection that the ordinance for the proposed improvement was not certified to the mayor or approved by him, comes too late when made for the first time in this court. Objection to evidence should be made on the trial. *Kankakee Stone and Lime Co. v. City of Kankakee*, 173.

3. *Non-assignment of dower—requisites of the bill—time to object that the bill is not sufficient.* See DOWER, 5.

**ASKING LEAVE TO FILE AMENDED PLEADING.**

4. *A party who desires to file an amended pleading should prepare it, and submit it to the inspection of the court.* He is not entitled, as of right, to an order giving him leave in advance to file it before it has even been drafted. There is, therefore, no error in refusing defendant's motion for leave to file an amended plea in abatement to an attachment, when the proposed plea is not prepared and submitted for inspection. *McFarland v. Claypool*, 397.

5. *Waiver as to judgment on demurrer.* Where a demurrer is sustained to a defendant's plea in abatement to a writ of attachment, and the defendant appears and asks leave to file an amended plea, it is questionable if he does not thereby waive his right to complain of the judgment upon the demurrer. *Ibid.* 397.

**DIRECTING WHAT THE VERDICT SHALL BE.**

6. If there is evidence on the part of the plaintiff tending to prove the issues involved, it is not proper to take the case from the jury by an instruction to find for the defendant. *Chicago and Northwestern Ry. Co. et al. v. Snyder*, Admx. 655.

7. Where a right of action fairly depends upon the effect or weight of testimony, the case is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them unless the testimony be of such a conclusive character as to compel the

**PRACTICE. DIRECTING WHAT THE VERDICT SHALL BE. *Continued.***

court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it. *Chicago and Northwestern Ry. Co. et al. v. Snyder, Admx. 655.*

8. In an action of ejectment by a village, to recover certain alleys claimed under a statutory dedication by a former owner, by plat, the plat was excluded as evidence, and the plaintiff's own evidence showed such an abandonment or non-user as was sufficient to defeat a recovery. At the close of the plaintiff's evidence, the court, on motion, instructed the jury to find for the defendant: *Held, no error in giving the instruction. Village of Auburn v. Goodwin et al. 57.*

**TRIAL BY THE COURT.**

9. *Propositions of law, and of fact.* Where the same proposition of law is substantially embraced in one "held" by the court as in one asked and refused, there will be no error in refusing to give the latter. *Knowles v. Knowles, 110.*

10. In a suit upon promissory notes, in which want of consideration and fraudulent misrepresentation, leading to their execution, are set up in defense, where the evidence is conflicting, a proposition submitted to the court trying the case without a jury, that the plaintiff is not entitled to recover, is a proposition of fact, and not of law, and therefore properly refused. *Ibid. 110.*

**IMPROPER REMARKS OF COUNSEL TO THE JURY.**

11. A court hearing counsel, under pretense of arguing a case, making statements of matters to the jury not in evidence, nor pertinent as illustrative of matters in evidence, should promptly stop him, explain to the jury the impropriety of his language, and take such measures as are appropriate to prevent a repetition of such misconduct, and for a failure of duty in this respect manifestly affecting the result, the judgment should be reversed. *Elgin, Joliet and Eastern Railroad Co. v. Fletcher et al. 619.*

12. In such case, the counsel whose client is unfavorably affected by such statements, should call the attention of the court to them at the time, lest the court might not otherwise have noticed the same. *Ibid. 619.*

**DISCHARGE OF JUROR PENDING TRIAL.**

13. *For supposed prejudice.* See **JURY, 1.**

**PRACTICE IN THE SUPREME COURT.****ASSIGNMENT OF ERROR.**

1. *By whom.* One party can not assign error for another who makes no complaint. So on bill to foreclose a mortgage, the mortgagor can not assign for error a decree by default against a tenant, taken upon an insufficient service of such tenant, who failed to join in the writ of error. *Brown et al. v. Miner et al. 148.*

**PRACTICE IN THE SUPREME COURT.****ASSIGNMENT OF ERROR. *Continued.***

2. If, however, the co-defendant has a joint interest with those complaining, the rule is different, for in such case a defendant has a right to insist upon a decree which settles the rights of all the parties concerned. *Brown et al. v. Miner et al.* 148.

3. *As to instructions requested on a given question.* Where both parties ask the court to instruct the jury on the question of exemplary damages, and thereby concede that such question is involved, neither can be heard to assign for error the fact that the court complied with his request. A party can not demand of the court that it rule upon a certain branch of the case, and then be heard to say that the court had no right to rule upon that branch of the case at all. *Illinois Central Railroad Co. v. Latimer*, 163.

4. *For what cause—and by whom—as to judgment entered pro forma, by consent.* A party can not complain of an error which he has himself induced the court to make, or has consented to. *Smith, Receiver, v. Kimball*, 583.

5. So where the judgment or decree of the trial court is affirmed by the Appellate Court, *pro forma*, on the motion of the appellant, under a stipulation of the parties that the decree or judgment shall be so affirmed, the appellant, on an appeal to this court, can not assign for error the judgment of the Appellate Court so entered at his request. Where a case is taken to the Appellate Court, it is the duty of that court to hear and decide it on its own judgment, and file a written opinion, briefly giving its reasons for its decision. *Ibid.* 583.

**CROSS-ERRORS.**

6. *Whether necessary.* On appeal of a tax-payer from a judgment of the county court, the appellee (the collector) can not allege for error the refusal of the county court to render judgment for a particular tax, unless cross-errors have been assigned on the record in accordance with the rule of this court. *St. Louis Bridge Co. v. The People ex rel. Baker, Collector*, 422.

**REMITTITUR.**

7. *In an action of ejectment—and entry of judgment for the proper quantity.* Where judgment is rendered on the first trial in an action of ejectment for a tract of land, on proof of title to only an undivided half in the plaintiff, this court will not allow the plaintiff to enter a *remitititur*, and take judgment for the undivided half of the land. *Strean et al. v. Lloyd et al.* 493.

**ERROR WILL NOT ALWAYS REVERSE.**

8. *Improper evidence.* Where the subject matter of interrogatories to witnesses is proper, and calls for evidence in the main pertinent to the issues raised by the pleadings and submitted to

**PRACTICE IN THE SUPREME COURT.****ERROR WILL NOT ALWAYS REVERSE. *Continued.***

the jury, the fact that some of the questions may have been improper in form will not call for a reversal, when the answers, taken in connection with the entire evidence, have worked no injury to the other party. *Hoobler et al. v. Hoobler*, 645.

**AMENDMENT OF RECORD.**

9. *At subsequent term.* See **AMENDMENTS**, 1, 2.

**PRESUMPTION.****NON-USER OF EASEMENT.**

*Presumption of extinguishment.* See **EASEMENT**, 1, 2.

**PROCESS.****RETURN OF SERVICE.**

1. *In chancery—sufficiency of return.* Summons in a suit to foreclose a mortgage was properly issued, and made returnable to the next term. The return of service was: "Executed this writ by reading the same to the within A, B, C and D, and by delivering to each a true copy hereof, this 10th day of April, 1872," and it was properly signed by the sheriff, and the service was in apt time: *Held*, that the return showed a good service, and that the fact of the reading of the summons did no harm, and might be disregarded. *Bonzarth et al. v. Largent*, 95.

**SALE OF LAND FOR TAXES.**

2. *Of the process, and the form thereof.* See **TAXATION AND TAX TITLES**, 13, 14.

**QUO WARRANTO.****TO QUESTION A FRANCHISE.**

*Against whom.* See **PARTIES**, 3.

**RAILROADS.****REMOVING PASSENGER.**

1. *For non-payment of fare—circumstances to be considered—what is a regular station.* In an action of trespass by a girl of about six years of age, against a railway company, for putting her off the train at a point about half a mile from its depot, but within the same town, for non-payment of fare, there is no error in allowing the plaintiff to prove that there was an extra train following the one from which the expulsion was made. The fact that in a few minutes a train was expected to arrive at the place of expulsion, is a circumstance proper to be considered by the jury in connection with all the other facts upon the question whether it was proper or improper for the conductor to put the plaintiff off at that particular point. *Illinois Central Railroad Co. v. Latimer*, 163.

**RAILROADS. REMOVING PASSENGER. *Continued.***

2. The regular stations on a railway at which the conductor is authorized, by section 94, chapter 114, to remove, or cause to be removed, a passenger for a refusal to pay fare, are the places on the railway where passenger trains usually stop for the purpose of having passengers get on and off such trains. The statute does not authorize the expulsion of a passenger for non-payment of fare at any place in the town or village in which the company may have its passenger depot building, other than at such depot platform. *Illinois Central Railroad Co. v. Latimer*, 163.

**REAL PROPERTY.**

**ESTATE OF HUSBAND IN WIFE'S LAND.** See **HUSBAND AND WIFE**, 2 to 8.

**RECEIVERS.****PROPERTY IN ANOTHER JURISDICTION.**

1. *Powers of a receiver.* The general rule is, that the powers of a receiver are co-extensive with the jurisdiction of the court which appoints him. He has no extra-territorial power of official action. But a receiver appointed in one State may, by comity, be permitted to recover the possession of property in another State, provided no citizen or suitor of the latter State is thereby prejudiced or injured. *Sercomb v. Catlin, Receiver*, 556.

**INTERFERING WITH PROPERTY.**

2. *After appointment of receiver—even before possession taken—power of the court.* After the appointment of a receiver of all the effects and property of A & B, an insolvent firm, C, the business manager of a foreign corporation having a branch office in this State, caused an attachment to be issued in Washington City, D. C., in favor of his corporation, against A & B, for a debt, and had the same levied on a stock of jewelry which A & B had, shortly before the appointment of the receiver, consigned to an auctioneer in Washington. C refused to dismiss the attachment suit, as directed by the court, whereupon the court adjudged C to be guilty of a contempt of court, and ordered his arrest and imprisonment: *Held*, that the court had the power to make the order of imprisonment. *Ibid.* 556.

3. Although the receiver of an insolvent firm or corporation may not have reduced to his possession the property and assets of the insolvents, this will not authorize any creditor to take legal steps against the property vested in the receiver, who is the officer of the court. Even if the property is in another State, this will not authorize a resident of this State to attach the same, as this will interfere with the receiver's taking possession. *Ibid.* 556.

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**REDEMPTION.****BY JUDGMENT CREDITOR.**

1. *Validity of original sale essential—and herein, of the effect of mere errors or irregularities.* If a foreclosure sale of land is void for any cause, a judgment creditor redeeming therefrom will acquire no title under his purchase, for the reason that his rights, like those of the first purchaser, are dependent upon a valid judgment or decree and sale. *Bozarth et al. v. Largent*, 95.

2. But where the trial court had jurisdiction of the subject matter and of the parties, mere errors and irregularities can not be taken advantage of to defeat a sale made under a decree in the cause, or to defeat a sale made on a redemption by a judgment creditor. *Ibid.* 95.

3. *Sale of lands en masse—as affecting the right of redemption—and the mode.* Although distinct tracts of land be sold *en masse* on decree of foreclosure, this will not render the sale void. At most it will be a ground for setting the sale aside, on proper application made in apt time. It can not be urged to defeat the sale in an action of ejectment. *Ibid.* 95.

4. But where several tracts of land are sold *en masse* on a decree of foreclosure, neither the original owner nor his judgment creditor can redeem a part of the lands so sold, but must redeem the whole. If the tracts are sold separately, either one may redeem any tract so sold. The judgment creditor's right to redeem is no greater or more extensive than that of his debtor. *Ibid.* 95.

5. *Who may question the regularity of a redemption by judgment creditor.* After the expiration of twelve months from the sale, the right of the judgment debtor is gone, and he no longer has any interest in the premises, and can not take advantage of irregularities in making redemption by his judgment creditor, and his acquisition of title by virtue of a sale under such redemption. If the purchaser at the first sale makes no objection to the validity of the redemption, and receives the redemption money, the redemption will be complete, and the original debtor can not object that the sale on redemption was *en masse*, even if it could have been made in any other way. *Ibid.* 95.

6. Where the estate of a life tenant by the courtesy is sold on a decree of foreclosure against him, his heirs (the remainder-men) can not object to a sale on redemption because the redemption was made in the name of a judgment creditor of the life tenant after he has assigned his judgment, instead of being made in the name of the assignee. *Ibid.* 95.

7. *Time of making the deed—in case of purchase by the redeeming creditor—the statute construed.* On a redemption by a judgment creditor, the statute provides that the redeeming creditor shall be

**REDEMPTION. BY JUDGMENT CREDITOR. *Continued.***

deemed as having bid at the sale the amount of the redemption money paid by him, with interest thereon, and costs, and that if no greater amount is bid the premises shall be struck off to such judgment creditor, and the officer shall "forthwith" execute a deed of the premises to him: *Held*, that the word "forthwith" is not mandatory, but directory, only, and that a deed made thereafter, even after the sheriff who made the sale goes out of office, is good and valid to pass the title. *Bozarth et al. v. Largent*, 95.

**SETTING ASIDE TRUSTEE'S SALE.**

8. *And allowing redemption—in equity.* See MORTGAGES AND DEEDS OF TRUST, 4, 5.

**REMAINDER.**

VESTED OR CONTINGENT. See ESTATES IN LAND, 1, 2, 3.

**REMITTITUR.****IN THE SUPREME COURT.**

*In an action of ejectment—and entry of judgment for the proper quantity.* See EJECTMENT, 6.

**RENEWAL NOTE.****WHETHER A PAYMENT OF A PRIOR NOTE.**

1. As a general rule, a new note given in renewal of another one will not be regarded as a satisfaction of the first, unless there is an express or implied agreement to that effect. *Chisholm v. Williams et al.* 115.

2. A party entitled to a mechanic's lien for improvements on certain property, took the owner's note, payable within twelve months from the time fixed for the completion of the work, and transferred the same to a third party, who, on its maturity, took a new note in renewal of the same, giving further time for payment, and took judgment thereon. The original payee took an assignment of the judgment, and offered to cancel the same in such manner as the court might direct: *Held*, that the latter had a right to a decree for a mechanic's lien on the original note, although the time when the renewal note fell due was more than one year after the time fixed for the completion of the work. *Ibid.* 115.

**RESCISSIION OF CONTRACTS.** See VENDOR AND PURCHASER, 1 to 7.

**RESPONDEAT SUPERIOR.** See MASTER AND SERVANT, 1, 2.

**RESULTING TRUST.** See TRUSTS AND TRUSTEES, 5.

**REVERSAL.****EFFECT UPON A PRIOR SALE.**

1. *As to parties and privies—and third persons.* Where property of a defendant has been sold on a judgment, afterward reversed, to a party to such judgment, the defendant can recover it back. If the purchaser be a third party, he can recover from the plaintiff the value thereof; but the title to the property, in that case, will not be affected by the reversal. No one but the defendant or his assignee can take advantage of such reversal; and he may waive that right, or if he has lost nothing by the judgment, he can, of course, gain nothing by its reversal. *Gould et al. v. Sternberg*, 510.

2. A sale on execution, based on a judgment afterward reversed, is not absolutely void, but voidable, only, at the election of the owner of the property sold. If the property of a third person is sold in satisfaction of the debt, the defendant in the judgment can take no advantage of the reversal. *Ibid.* 510.

3. A creditor under a judgment sued out an execution thereon, under which he became the purchaser of a tract of land which the debtor had fraudulently sold and conveyed to another. The creditor then filed his bill against his debtor and his grantee, to set aside the conveyance of the former to the latter as fraudulent, and a decree was entered therein setting aside the conveyance and vesting the title in the complainant. The judgment under which the sale was made was reversed about the date of the decree, and no steps were taken for a rehearing in the chancery suit, or bill of review filed: *Held*, that the reversal of the judgment did not operate to divest the title of the creditor as vested by the decree, and that such decree could not be attacked collaterally. *Ibid.* 510.

**SALES.****SALE ON EXECUTION.**

1. *A contingent remainder* is not subject to sale on execution against the party entitled to the same. *Harcard et al. v. Pearey*, 430.

2. *Effect of subsequent reversal of the judgment—as to parties and privies—and third persons.* See REVERSAL, 1, 2, 3.

**SERVICE OF PROCESS.****IN CHANCERY.**

*Sufficiency of return.* See PROCESS, 1.

**SPECIAL ASSESSMENTS.****RULE FOR ASCERTAINING BENEFITS.**

1. *Market value—present use of property, and of the use to which it is adapted.* In a proceeding to levy and collect special assessments on property benefited, the true inquiry is, what will the influence of the proposed improvement be upon the market value

**SPECIAL ASSESSMENTS.****RULE FOR ASCERTAINING BENEFITS. *Continued.***

of the property claimed to be benefited thereby. The jury should consider what the property is then fairly worth in the market, and what will be its value when the improvement is made. *Kankakee Stone and Lime Co. v. City of Kankakee*, 173.

2. In determining the present market value, it is competent for the jury to take into consideration the uses to which the property is put, or for which it is suitable or adapted. If the present value of the property is increased by reason of the use to which it is then put, or its market value will be materially affected by an interference with that use, and the proposed improvement will have that effect, that is a matter clearly competent for the consideration of the jury. *Ibid.* 173.

3. On a proceeding to confirm a special assessment upon certain lots, the court instructed the jury: "You are instructed that it makes no difference in this case whether or not the property assessed is used at present for such a purpose that it will not be specially benefited by the proposed sidewalk, or is put to any use to which the market value of the same is at present unimportant; and in determining your verdict, you should not take into consideration the present use to which the lots or tracts, or both, are put, but you should consider whether or not the market value of said lots or tracts, for any legitimate purpose for which the same may be used, will be increased by reason of the construction of the proposed sidewalk." *Held*, that the instruction was erroneous, in directing the jury that they should not take into consideration, in determining the market value, the present use to which the lots were put. *Ibid.* 173.

**SPECIAL FINDING BY JURY.****GENERAL VERDICT.**

*Whether inconsistent.* See **VERDICT, 1.**

**SPECIFIC PERFORMANCE.** See **CHANCERY, 19.****STATUTES.****TITLE OF AN ACT.**

1. *Constitutional requirement.* The first clause of section 13 of article 4 of the constitution, which provides "that no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title," only requires that the subject of the act be expressed, in general terms, in the title. It is sufficient if the title is comprehensive enough to reasonably include as falling within the general subject, and as subordinate branches thereof, the several objects which the statute assumes to effect. *Donnersberger v. Pendergast et al.* 229.

47-128 ILL.

**STATUTES. TITLE OF AN ACT. *Continued.***

2. *Of the title of the act of 1887 amendatory of the Township Organization law of 1874.* See TOWNSHIP ORGANIZATION, 4, 5.

**ACT VOID IN PART.**

3. *Validity of other portions.* Where the constitutional and unconstitutional provisions of a statute are distinct and separable, the valid provisions may stand and be enforced as though the invalid one had not been introduced. Because a portion of a statute is unconstitutional, it does not follow that the court may declare its other provisions void, if they are separable, and the valid portions are capable of enforcement independently of such void provision, unless it shall appear that all of the provisions of the act so depend on each other, operating together for the same purpose, or are otherwise so connected together in meaning, that it can not be presumed the legislature would have passed the one without the other. *Donnersberger v. Prendergast et al.* 229.

4. Where an act is done under the provisions of a statute, some of which are void and others valid, it will be presumed to have been done without reference to the void provisions, unless there is something clearly indicating the contrary. *Ibid.* 229.

**LAW AS A RULE OF ACTION.**

5. *To antecede the facts which may call it into action.* The existence of a law, and the existence of a present subject matter upon which it will take effect, are distinct things, the former depending upon the will of the legislature; and the latter upon the conduct of the people in the respect contemplated by the law after it is in force as a rule of action. The declaration of the rule of conduct must antecede the facts which call it into action. *Germania Ins. Co. v. Swigert, Auditor,* 237.

**STATUTES CONSTRUED.**

6. *Return of assessor's books—within what time.* The statute construed in *St. Louis Bridge Co. v. The People ex rel. Baker, Collector,* 422. See TAXATION AND TAX TITLES, 2.

7. *"Freehold"—meaning of that word, as used in the statute relating to appeals and writs of error.* *Kirchoff v. Union Mutual Life Ins. Co.* 199. See APPEALS AND WRITS OF ERROR, 15 to 18.

8. *Powers of municipal corporations—in regard to sanitary matters—whether the power extends to the erection and maintenance of public slaughter-houses.* The statute construed in *Huesing v. City of Rock Island et al.* 465. See MUNICIPAL CORPORATIONS, 4, 5, 6.

9. *Redemption by judgment creditor—time of making the deed in case he becomes the purchaser.* The statute construed in *Bosarth et al. v. Largent,* 95. See REDEMPTION, 7.

**STATUTE OF FRAUDS.****MUST BE PLEADED.**

1. The Statute of Frauds must be pleaded, to be available as a defense. *Bragg v. Olson et al.* 540.

**PART PERFORMANCE.**

2. *To take a case out of the statute.* The delivery of possession of land by the vendor, the payment of the purchase money and the making of valuable improvements on the premises by the purchaser and his heirs, will take a parol contract of sale out of the Statute of Frauds. *Ibid.* 540.

**IN THE CASE OF A TRUST.**

3. Where a party, by voluntarily assuming a confidential relation, as, that of a trustee, to save the homestead of another, and by means of confidence thus inspired obtains the title thereto, and refuses to perform his promises, the law will raise a constructive trust, which a court of equity will enforce, and the Statute of Frauds will have no application. *Gruhn v. Richardson et al.* 178.

**SUBSEQUENTLY ACQUIRED TITLE.** See INURING OF TITLE, 1.**SURFACE WATERS.** See WATER-COURSES, 1, 2, 3.**TAXATION AND TAX TITLES.****TAXATION—FOR WHAT PURPOSE.**

1. *By a village—to pay town officers.* An incorporated village has no power to levy a tax for the payment of the salaries of town officers, and if a village does levy such tax it will be illegal, and will render the judgment in which such tax is included, and a tax sale thereunder, void. *Drake et al. v. Ogden*, 603.

**RETURN OF ASSESSOR'S BOOKS.**

2. *At what time.* Section 90 of the Revenue act, requiring the assessor to return his books to the county clerk on or before the first day of July, is directory, merely, and under sections 191 and 280, the failure of the assessor to return his books on the day fixed will not vitiate the assessment. *St. Louis Bridge Co. v. The People ex rel. Baker, Collector*, 422.

**TOWN BOARD OF REVIEW.**

3. *Adjourned meeting.* On the fourth Monday of June, which was the 27th, the assessor and town clerk met to hear complaints in respect of the assessment of property in the town. On objection being made to the assessment of a bridge structure, an adjournment was made to the following day on account of the death of the supervisor, and so on until July 2, when the successor of the supervisor was appointed, and was present, and the assessment of the bridge was raised, on the complaint of the mayor of the city in

**TAXATION AND TAX TITLES. TOWN BOARD OF REVIEW. *Continued.***

which the bridge was situated: *Held*, that the action of the board of review in adjourning was not contrary to law. *St. Louis Bridge Co. v. The People ex rel. Baker, Collector*, 422.

4. *Evidence—to show meeting and adjournment of town board.* The record of a town clerk showing that he and the local assessor met to review the assessment of property, and an adjournment of the hearing of complaints to a subsequent day, is the best evidence of the fact of such meeting and adjournment. *Ibid.* 422.

**QUESTIONING ASSESSMENT.**

5. *By whom.* The township board of review may increase the assessment of any particular property on the application of any person who shall complain. The right to make such application is not confined to tax-payers. A city interested on account of its revenues may make the application through its mayor. *Ibid.* 422.

**APPEAL TO COUNTY BOARD.**

6. Where the town board of review improperly increases an assessment, it would seem that the owner of the property assessed may apply to the county board, under section 97 of the Revenue act. *Ibid.* 422.

**NOTICE OF TAX SALE.**

7. *And time of redemption—its requisites, under the statute.* The statute expressly requires the notice of a tax sale, which may be served or published, to state when the land was purchased, in whose name taxed, the description of the land, for what year taxed or specially assessed, and when the time of redemption will expire; and a notice which omits any one of these requirements will be absolutely void. *Drake et al. v. Ogden*, 603.

8. *Whether notice may include more than one tract.* It will not vitiate a notice of the tax purchase and when the redemption will expire, that more than one tract or lot may be included in such notice. The statute being silent on this subject, the purchaser or his assignee may exercise his own judgment on the subject. *Ibid.* 603.

9. *Service of notice—upon whom—who is an "occupant."* The placing of a few stacks of hay by a person on a tract of land actually occupied by another, and inclosing the stacks by boards to protect them from the rains, there being no agreement to pay rent, the owner and occupant, however, consenting to the placing of the stacks on the land, is not sufficient to put the owner of the hay in the actual possession or occupancy of the land or any part thereof, within the meaning of section 216 of chapter 120 of the Revised Statutes, entitled "Revenue," and a purchaser of the land for taxes is not required to serve a notice of his purchase on such person stacking his hay on the premises. *Ibid.* 603.

**TAXATION AND TAX TITLES. *Continued.*****TAX SALE OF SEVERAL TRACTS.**

10. *In what order to be made.* The statute requires the collector, on the day specified in the notice for the sale of lands for taxes, to offer for sale, separately and in consecutive order, each tract of land, or town or city lot, on which the taxes, special assessments, interest or costs have not been paid. The collector has no power to disregard this mandate of the statute, and if he does so, a sale can not be sustained. *Drake et al. v. Ogden*, 603.

11. Where the collector, however, in addition to the general list for taxes proper, has special lists in certain towns for delinquent special assessments, he may, in the case of a town where there are two lists, in his discretion, take up either list first and then sell under the other list, and this will not be to disregard the direction of the statute. *Ibid.* 603.

**JUDGMENT FOR TAXES.**

12. *How far conclusive.* Section 224 of the Revenue act does not make the judgment against the lands for taxes conclusive as an estoppel that the taxes included therein were legal taxes. It shuts out all objections that might have been urged against the judgment, except in cases of payment, or when the land was not liable to the tax or assessment,—and this embraces illegal taxes. *Ibid.* 603.

**SALE OF LAND FOR TAXES.**

13. *Of the process, and the form thereof.* Section 194 of the Revenue law provides, that on the day advertised for sale, the county clerk, assisted by the collector, shall carefully examine the list upon which judgment has been rendered, etc., and shall make a certificate, to be entered on said record, following the order of court, that such record is correct, and that the judgment was rendered upon the property therein mentioned, for the taxes, interest and costs due thereon. The certificate is to be attested by the clerk, under the seal of the court, and is made the process under which all sales are made. Without such attested certificate a sale of land, or any interest therein, is void, and no title can be derived from any such sale. *Ames et al. v. Sankey et al.* 523.

14. Where the law expressly directs that process shall be issued in a specified form, such a provision is mandatory. This rule applies to that which stands in the place of process, and performs its office. *Ibid.* 523.

**TELEGRAPHHS.****DUTY AND LIABILITY.**

1. *Likened to common carriers.* Telegraph companies are the servants of the public, and are bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like

**TELEGRAPHS. DUTY AND LIABILITY. *Continued.***

common carriers, the law imposing on them a duty which they are bound to discharge. The extent of their liability is to transmit correctly the message as delivered. *Western Union Telegraph Co. v. Dubois*, 248.

**MISTAKE IN TELEGRAM.**

2. *Rights and remedies of the person receiving the dispatch.* In England the receiver of a telegraphic dispatch can not sue the telegraph company for a mistake therein, on the ground that the obligation of the company springs entirely from the contract, and that the contract for the transmission of the message is with the sender of it. *Ibid.* 248.

3. But in this country it is well settled that the receiver of the dispatch may maintain an action against the telegraph company through whose negligence the message has been altered or changed, for such loss or damage as he may have sustained by reason of having been led to act upon the dispatch. *Ibid.* 248.

4. Where there is no contract relation between the receiver of a telegram and the telegraph company transmitting the same, the former can not maintain assumpit against the latter for a loss caused by a neglect to send the message correctly. In such case, the receiver is limited to an action on the case, of which a justice of the peace has no jurisdiction. *Ibid.* 248.

**TOWNSHIP ORGANIZATION.****CHANGING BOUNDARIES OF TOWNS, ETC.**

1. *Validity of amendatory act of 1887.* Section 12 of article 3 of the Township Organization law, as amended in June, 1887, so far as it relates to proceedings to disconnect part of the territory of one town and annex the same to a contiguous town, is a valid and constitutional law, but is void in so far as it attempts to change the boundaries of incorporated cities, towns and villages by limiting or extending their territorial boundaries and jurisdiction. *Donnersberger v. Prendergast et al.* 229.

2. *Effect of act of 1887, as a repeal of the prior law.* The provisions of section 12 of article 3 of the Township Organization law, as amended in 1887, being a valid law so far as it relates to the same subject matter included in the act of 1874, necessarily operates as a repeal of the former law, and the law as amended takes its place. *Ibid.* 229.

3. *Former decisions.* The cases of *Dolese v. Pierce*, 124 Ill. 140, and *Village of Hyde Park v. City of Chicago*, id. 156, held, that section 12 of article 3 of the Township act of 1874, as amended in 1887, in so far as it attempted to authorize a change in the boundaries of incorporated cities and villages, was in violation of section 13 of

**TOWNSHIP ORGANIZATION.****CHANGING BOUNDARIES OF TOWNS, ETC. *Continued.***

article 4 of the Constitution, and therefore void. But the question of the validity of that law in providing for a change in the boundaries of towns by taking territory from one and annexing the same to another, was not involved. *Donnersberger v. Prendergast et al.* 229.

**TITLE OF THE ACT OF 1887.**

4. *Amendatory of the Township Organization law of 1874.* The act of 1887, entitled "An act to amend sections 2, 4, 6, 7, 10, 11 and 12 of article 3 of an act entitled 'An act to revise the law in relation to township organization,' approved and in force March 4, 1874," so far as it relates to the subject matter contained in the sections before amendment, and in respect of matters germane thereto, is a valid enactment, as the subject of it is expressed in its title; but in so far as section 12 of the act of 1887 provides for a change in the boundaries of incorporated cities and villages, it is void, as not being embraced in the title of the act. *Ibid.* 229.

5. Under the title of the act of 1887, the legislature had the right to provide, as it did, for the change of township boundaries; but this right did not carry with it, as an incident, the power to change the boundaries of cities and villages, unless the change in the latter was necessary to effectuate a change in the former, or at least promote such object, which was not the case. *Ibid.* 229.

**TOWN PLAT.****OF THE OFFICIAL CERTIFICATE.**

1. *County surveyor's certificate—how far essential.* Under the Revised Statutes of 1845, the county surveyor's certificate to the plat of a town or addition thereto, is a requisite part of such plat, although acknowledged by the proprietor. The plat is entitled to neither acknowledgment nor record until it has been first certified by the county surveyor. His certificate must also be recorded, and form a part of the record. Then, and not till then, does the plat become evidence of title in the corporation to the streets and alleys designated on the plat. *Village of Auburn v. Goodwin et al.* 57.

2. The plat or map of a town or addition, under the law of 1845, operates as a conveyance in fee of the streets and alleys to the corporation only by force of the statute. If the plat is not made out, certified and acknowledged substantially as required by the statute, it affords no evidence of title in the corporation to the streets and alleys. *Ibid.* 57.

3. *Former decision.* The case of *Gebhardt v. Reeves*, 75 Ill. 305, in so far as it holds that the certificate to the survey and plat of a town or addition thereto may be legally made by a surveyor other

**TOWN PLAT. OF THE OFFICIAL CERTIFICATE. *Continued.***

than a county surveyor, under the statute of 1845, and in so far as it holds that the acknowledgment and recording of a town plat vests the fee to streets and alleys in the municipality regardless of a compliance with the requirements of the statute as to the survey, plat and certificate of a county surveyor thereto, is in conflict with *Trustees v. Walsh*, 57 Ill. 360, and *Thomas v. Eckard*, 88 id. 596, and is overruled. *Village of Auburn v. Goodwin et al.* 57.

4. *Certificate by deputy county surveyor—but to be in the name of the principal.* As county surveyors, under the law of 1845, were authorized to appoint deputies, it follows that the provisions of the statute as to the survey, plat or map, and certificate to the same, will be complied with if it appears to have been done by the county surveyor in person, or by his deputy. *Ibid.* 57.

5. But as a deputy officer, as a rule, subject, perhaps, to some special statutory exceptions, derives all his powers and authority from his principal, in all his official acts he must act in the name of his principal. Therefore a deputy county surveyor, acting in his own name, and not that of his principal, in making a survey and plat of a town addition, does not bind the principal, or make his act that of the county surveyor. *Ibid.* 57.

6. *Sufficiency as to certainty.* If the plat and certificate of a surveyor are such that a competent surveyor, from the data given, may locate the plat, lots and blocks, streets and alleys, and determine the dimensions of the same, they will be sufficiently definite and certain. *Ibid.* 57.

**FIGURES ON PLAT.**

7. *Whether indicating the width and length of the lots.* A certificate of the acknowledgment of the plat of an addition showed that the figures in black ink near the center of the lots indicated the number of such lots. There were other figures along the ends and sides of the lots, but nothing, either on the face of the plat or in the certificates thereto attached, to show what they meant: *Held*, that such last named figures were meaningless, and could not be taken as indicating the width and length of the lots; but if such figures appeared to represent distances, they would have to give way to the actually established metes and bounds of the lots. *Eckhart et al. v. Irons et al.* 568.

**TRIAL BY JURY.**

IN CHANCERY. See CHANCERY, 24 to 28.

**TRUSTS AND TRUSTEES.****TRUST VOLUNTARILY ASSUMED.**

1. *Not to be repudiated.* G., having a small claim against a debtor who was being harassed by creditors, under the guise of friendship

**TRUSTS AND TRUSTEES. TRUST VOLUNTARILY ASSUMED. *Continued.***

falsely advised the debtor and his wife that the creditors would take their homestead, which was in the wife, unless they mortgaged the same to him, and promised that if they would mortgage the same, he would, when he acquired the title, convey to the debtor's wife, and thereby induced them to execute a mortgage for the sum he claimed, and afterward induced them to give a fictitious note and mortgage to a third person for \$1000, which G. afterward procured to be assigned to himself, and obtained a decree of foreclosure and sale, professedly for the benefit of the wife, but afterward refused to convey to her, disavowing and denying the trust: *Held*, that G. could not be allowed to repudiate his assumed trust, and that a court of equity would compel him to convey to the wife, or set aside the mortgages and sale of the property to him. *Gruhn v. Richardson et al.* 178.

**STATUTE OF FRAUDS.**

2. Where a party, by voluntarily assuming a confidential relation, as, that of a trustee, to save the homestead of another, and by means of confidence thus inspired obtains the title thereto, and refuses to perform his promises, the law will raise a constructive trust, which a court of equity will enforce, and the Statute of Frauds will have no application. *Ibid.* 178.

**TRUSTEE PROTECTING TRUST ESTATE.**

3. *Equitable lien in favor of trustee.* The fact that a person becomes the trustee of another, of property bought by taking an assignment of the contract of purchase, to hold the same in trust, will not preclude him from afterward advancing money, at the request of the *cestui que trust*, to prevent a declaration of forfeiture of the contract of purchase; and if the trustee makes such advance with, or even without, the request of the *cestui que trust*, and thereby prevents a loss of the property, he may take the title, with the consent of the *cestui que trust*, and hold it as security for the money so advanced by him, and have an equitable lien on the property therefor. *Stewart et al. v. Fellows et al.* 480.

4. While it may be that a trustee holding the title to a lot in trust for another would be prevented, from his position as such, from demanding that other claims held by him should be tacked on and secured upon the property to the injury of the *cestui que trust*, that would in nowise affect his equitable lien for money necessarily advanced by him to protect and preserve the estate of his *cestui que trust*. *Ibid.* 480.

**RESULTING TRUST.**

5. *In favor of a wife—of money loaned to the husband.* Where a wife, after the passage of the Married Woman's act of 1861, loans her money to her husband, she will become simply his creditor, and if the husband invests the money so borrowed in the purchase of

**TRUSTS AND TRUSTEES. RESULTING TRUST. *Continued.***

land in his own name, no resulting trust will arise in favor of the wife. *Stewart et al. v. Fellows et al.* 480.

**TRUST CREATED BY WILL.**

6. *Whether a trust rests upon the subject of a devise.* See WILLS, 14 to 19.

**DEED OF TRUST TO SECURE A DEBT.**

7. *Power of sale in the deed.* See MORTGAGES AND DEEDS OF TRUST, 2 to 5.

**UNRECORDED DEED.****ATTACHING CREDITOR.**

1. *Without notice.* An attaching creditor who levies his attachment without notice of a prior unrecorded deed of his debtor, either actual or constructive, acquires a lien, which, if perfected by judgment, execution, sale and deed, will hold the legal estate, as against the grantee in the prior unrecorded deed. Having acquired a lien as creditor without notice, he will have a right to enforce the same, notwithstanding he may have, subsequently to the levy of his attachment, received notice of the deed. *Thomas et al. v. Burnett,* 37.

**VENDOR AND PURCHASER.****OF THE RIGHT OF RESCISSION.**

1. *Conditions upon which it rests.* Where one has obligated himself to convey to another a fee simple title to a tract of land by a warranty deed, before the vendor can rescind the contract for non-payment of the purchase money, he must not only tender to the purchaser a proper deed, but must also be able to convey a marketable title,—that is, a title not subject to such reasonable doubt as would create a just apprehension, or one that persons of reasonable prudence and intelligence would be willing to take and pay the fair value of the land. *Hale v. Cravener,* 408.

2. A person holding land in trust under a will, made a contract for its sale, agreeing to make a warranty deed conveying the title in fee, and to furnish an abstract showing title and his power to sell and convey, tendered his deed after the filing of a bill by the heirs of his testator to set aside the will, and on refusal of the vendee to accept the deed and perform his part of the contract, the vendor filed his bill to rescind the sale. It was held, that as the vendor was not able to convey such a title as would satisfy the covenants of his agreement, he could not put the purchaser in default by the tender, and demanding performance before the termination of the suit to contest the will, which was his authority to convey. In such case, no prudent man would accept the deed subject to the doubt and uncertainty cast upon his right to convey by the filing of the bill to set aside the will. *Ibid.* 408.

**VENDOR AND PURCHASER. OF THE RIGHT OF RESCISSION. *Continued.***

3. A contract for the sale and conveyance of land provided that the vendor, on or before a day named, should make and deliver to the purchaser an abstract showing title and the right to convey, and that if the abstract failed to show a good title, then the cash payment which had been made should be returned to the purchaser and the contract determined: *Held*, that the clause relating to the rescission of the contract if the abstract did not show a good title, was for the benefit of the purchaser, and that the vendor could not take advantage of it to rescind the contract. *Hale v. Cravener*, 408.

4. A party who seeks to determine his contract by availing himself of a condition therein contained providing for such determination, must bring himself strictly within the terms of such condition. Such a condition is not to be construed liberally, nor enlarged to include facts or circumstances not within its terms, but on the contrary, is, in contracts for the sale of land, to be taken most strongly against the vendor. *Ibid.* 408.

5. A vendor can not make use of a condition to rescind his contract for the purpose of getting rid of a duty which attaches to him upon the rest of the contract. *Ibid.* 408.

6. A trustee under a will made a contract for the sale of a tract of land, and \$500 was paid down. The vendor was, by a given time, to furnish the purchaser with an abstract showing title and his right to convey, and if he failed to show a good title, then the \$500 was to be returned and the contract to terminate. Independently of this, the vendor covenanted that on performance by the purchaser he was to convey and assure to the latter a fee simple title. The vendor furnished an abstract, which on its face showed a good title and right to convey, but in fact there was a bill then pending, filed by the heirs of the testator, to set aside the will, not shown in the abstract: *Held*, that the vendor had not brought himself within the terms of the condition, although his abstract did not show any defect in his title, and that he could not rely on facts outside of the abstract as a ground of rescission, and further, that he was bound to convey by his covenant to that effect. *Ibid.* 408.

7. As a general rule, a contract can not be determined or rescinded by a party to it for non-performance of the other party, unless the former is in a position to demand a specific performance. *Ibid.* 408.

**WAIVER OF PRIOR PERFORMANCE.**

8. Under a contract for the sale of land, the purchaser was to pay down \$500, which was done. The vendor was then, by a certain time, to furnish the vendee an abstract showing a good title and power to convey such a title, and in ten days thereafter the purchaser was to pay \$3500, and execute notes for the balance of the

**VENDOR AND PURCHASER.****WAIVER OF PRIOR PERFORMANCE. *Continued.***

price, secured by mortgage, when the vendor obligated himself to convey the title in fee simple. It was also provided, that if the abstract, when furnished, failed to show such title, the \$500 was to be returned and the contract to be determined. The abstract was furnished, showing a good title, but failed to show the pendency of a bill to set aside a will, under which the vendor claimed authority to sell and convey: *Held*, that each party was bound to perform in the order stated,—that the doing of the preceding act required the performance of the succeeding act by the other, and that one party might waive the doing of the preceding act by the other, and proceed to the performance of the succeeding act. *Hale v. Crarener*, 408.

**VENDOR'S LIEN.** See LIENS, 9.

**VERDICT.****GENERAL VERDICT.**

1. *And special findings—whether inconsistent.* A special finding of a jury that the employes of one of the defendant railways, in charge of its train when it crossed the track of another road, were not guilty of negligence that materially contributed to the injury, is not inconsistent with a general verdict finding both the defendants guilty of negligence contributing to the injury, where the negligence charged and proved was, that the agent of both companies defendant failed to properly manage the semaphore and so signal as to prevent a collision, such agent not being an employe having charge of the train. *Chicago and Northwestern Ry. Co. et al. v. Snyder*, Admz. 655.

**WAIVER.****DEPENDENT CONDITIONS IN CONTRACT.**

1. *Waiver of prior performance.* See VENDOR AND PURCHASER, 8.

**TRIAL BY JURY.**

2. *May be waived—in civil cases.* See EMINENT DOMAIN, 1.  
3. *Waiver in criminal cases.* See CRIMINAL LAW, 1 to 4.

**WATER-COURSES—SURFACE WATERS.****DOMINANT AND SERVIENT HERITAGE.**

1. *Rights at the common law.* The owner of a dominant estate has no right, at common law, to divert the waters of a slough therein into a channel wholly different from that in which they naturally flow. *Dayton v. Drainage Comrs.* 271.

**WATER-COURSES—SURFACE WATERS.****DOMINANT AND SERVIENT HERITAGE. *Continued.***

2. The owner of a higher tract of land has the right to have the surface water falling or naturally coming upon his premises by rains or melting snow, pass off through the natural drains upon or over the lower or servient land next adjoining; and the owner of the dominant heritage has the right, by ditches and drains, to drain his own land into the channels which nature has provided, even if the quantity of water in that way thrown upon the next and adjoining lower lands is thereby increased. *Dayton v. Drainage Comrs.* 271.

3. But the owner of the higher lands has no right to open or remove natural barriers, and let on to such lower land water which would not otherwise naturally flow in that direction. That would be to subject the servient heritage to an unreasonable burden, which the law will not permit. *Ibid.* 271.

**UNDER DRAINAGE LAW OF 1885.**

4. *Rights of dominant heritage.* See DRAINAGE LAW, 1.

**WRONGFUL DIVERSION OF SURFACE WATERS.**

5. *Remedy by injunction.* See INJUNCTIONS, 1.

**WILLS.****WHAT RIGHTS WILL PASS.**

1. *Devise of land held in security for a debt passes a right to collect the debt.* If a party holding the legal title to land as a security for the payment of moneys advanced for the benefit of the real owner, devises the land, the devise will carry whatever right the devisor had therein, to his donee. *Stewart et al. v. Fellows et al.* 480.

**QUANTITY OF ESTATE DEVISED.**

2. *Whether a fee, or less than a fee.* It is provided by statute, that every grant, conveyance or devise shall be deemed a fee simple estate of inheritance, though lacking the use of words necessary, at the common law, to create such an estate, if a less estate be not limited by express words, or does not appear to have been granted, conveyed or devised by construction or operation of law. *Giles et al. v. Anslow et al.* 187.

3. A simple devise of land, without any words of perpetuity or inheritance, under the statute, is sufficient to pass an absolute estate in fee, unless a contrary intent is shown in other parts of the will. The intention of the testator, which controls, is to be ascertained from the whole will. If a less estate than a fee is intended, it is wholly immaterial in what part of the will such intention is manifested. *Ibid.* 187.

**WILLS. QUANTITY OF ESTATE DEVISED. *Continued.***

4. It is the disposition of the courts to adopt such a construction as will give an estate of inheritance to the first donee. When, therefore, the fee is devised by a clause or clauses of a will, and other portions or clauses are relied on as limiting or qualifying the estate thus given, they should be such as to show a clear intention on the part of the testator to thus limit or qualify the estate granted. Such an intent should clearly and unequivocally appear. *Giles et al. v. Anslow et al.* 187.

**DEVISE OVER UPON CONDITION.**

5. *As, the settlement of the estate before the death of the first taker—as determining where the fee shall go.* A testator devised all his estate, real and personal, to his wife, subject to the payment of his just debts, and appointed her his sole executor. The will further provided, that in case of the death of his wife before the settlement of his estate, all the testator's property should be equally divided between his two nephews: *Held*, that the settlement referred to, which would operate to defeat the devise to the wife, was a settlement or adjustment of the estate in the due course of administration in the county court, and that such settlement in her lifetime was a condition upon which the devise to her depended. *Ibid.* 187.

6. Until such settlement of the estate, which included the payment of the debts, the amount devised was uncertain, as it might become necessary to sell land, or some part thereof, to pay the claims against the estate; but when the administration was completed and closed, her rights became fixed and determined. If made during her life, she took the remaining estate absolutely; if not, it went to the nephews. *Ibid.* 187.

7. In this case, a final settlement of the estate was made in the lifetime of the first donee, and so it was held, that the clause devising the estate to the nephews in the event of the death of the widow before the settlement of the estate, did not in any manner affect the devise to the widow, and that she having performed the condition annexed to her right, her estate ceased to be conditioned, and that the condition on which the nephews were to take, failed. *Ibid.* 187.

**EQUITABLE CONVERSION.**

8. *As, a change in the nature of property—real estate to personal, and personal estate to real.* An equitable conversion is defined to be that change in the nature of property by which, for certain purposes, real estate is considered as personal and personal estate as real, and transmissible and descendible as such. It is an application of the maxim, that equity regards that as done which ought to be done. *Haward et al. v. Peavey*, 430.

9. It is not essential that there should be an express declaration in the instrument that the land shall be treated as money although

**WILLS. EQUITABLE CONVERSION. *Continued.***

not sold, or that the money shall be treated as land although not actually laid out in the purchase of it. Such direction may arise, by necessary implication, from the nature of the instrument or the language employed. *Haward et al. v. Peavey*, 430.

10. There must, however, be an expression, in some form, of an absolute intention that the land shall be sold and turned into money, or that the money shall be expended in the purchase of land. The test is, has the will or deed absolutely directed that the conversion be made. In order to work a conversion while the property remains unchanged in form, there must be a clear and imperative direction to convert it. *Ibid.* 430.

11. If the act of converting is left to the option, discretion or choice of the trustees or others charged with making it, no equitable conversion will take place, because no duty to make the change rests upon them. *Ibid.* 430.

12. In this case, a testator devised all his estate after the payment of debts, etc., to his executors, in trust, for the support of his widow, and provided that on her death or marriage the executors should divide the property among his five children, or such of them as should then be living, or the lawful issue of such as might be dead. He also expressed a wish that the land be kept in the family, and authorized his executors to sell it to any of his sons at its full value, and provided that if any of his sons had any money advanced for them to begin with, the others should be made equal to them in the division: *Held*, that the executors were given a power of sale, the purchasers being limited to his sons, but that no imperative duty of sale was imposed, and hence there was no equitable conversion of the land into money. In such case, if no one of the sons was willing to purchase and pay the full value of the land, the power of sale could not be executed. *Ibid.* 430.

**CONTINGENT REMAINDER.**

13. A testator devised all his estate to his executors, in trust, for the benefit of his widow for life, or until her marriage, with the remainder to such of his children as should be alive at the termination of the precedent estate, or to the lawful issue of such of them as might be dead leaving such issue: *Held*, that the estate devised to the sons was a contingent remainder, until the happening of the contingency that the persons who were to take the estate should be alive at the death or re-marriage of the widow. In such case, it makes no difference that the sons were named in the devise. *Ibid.* 430.

**CHARGING A TRUST UPON AN ESTATE.**

14. Whether a trust rests upon the subject of a devise. A trust may be impressed upon the subject of a devise, but an intent to

**WILLS. CHARGING A TRUST UPON AN ESTATE. *Continued.***

create the trust must clearly appear. If the intention of the testator be doubtful, precatory words will not be construed into a declaration of a trust. *Giles et al. v. Anslow et al.* 187.

15. Mere expressions of a desire that the donee will be kind to, remember, consider, deal justly by, educate and provide for, or to do justice to a certain class of persons, will raise no trust. *Ibid.* 187.

16. In the absence of words showing a contrary intent, a gift, whether of land or personal property, will be presumed to be absolute, and before it will be held to be in trust, it must be clear that the testator intended the property bequeathed, or some part of it, to be applied by the donee for the purpose of the trust,—and this is to be determined from a consideration of the entire will, and the circumstances and condition of the estate devised. So the fact that personal property was included in the devise to a wife, and was expected by the testator to go with the real estate to her, may be considered as indicative of an intent to give her an absolute estate in the land. *Ibid.* 187.

17. No trust will be implied from precatory words, where the donee may, at his discretion, apply the property to other purposes, or where there is an express direction that the donee's absolute interest is not to be curtailed, or when the precatory words are not stated to be obligatory, or when the donee is to take free and unfettered. *Ibid.* 187.

18. Where the words of a gift expressly point to an absolute enjoyment by the donee himself, the natural construction of subsequent precatory words is, that they express the testator's belief or wish without imposing a trust. *Ibid.* 187.

19. By the first clause in a will a testator made an absolute devise of all his estate to his widow, upon the sole condition that she should settle up his estate. By the following clause the estate was devised to his nephews in case his widow should die before the settlement of the estate, after which are these words: "I have full confidence in my beloved wife, Mary, that she will do what is best and proper with my effects, and that she would do with my property the same as I would wish to have done—that she will take care of the proceeds. She is, by this gift, free from all restraint, to do as may seem to her best and proper :" Held, that the will created no trust on the subject of the devise in favor of the testator's nephews, or for any one else, and that the wife took an absolute estate in fee upon the settlement of the estate in her lifetime. *Ibid.* 187.

**CREATING AN ANNUITY.**

20. *Of an annuity charged upon rents and profits—whether chargeable upon the corpus of the estate.* A direction in a will to pay an

**WILLS. CREATING AN ANNUITY. *Continued.***

annuity out of the rents and profits of lands devised, charges only the rents and profits, and not the *corpus* of the estate, unless a contrary intention appears, and can be enforced only against the devisees personally, so far as they have received the rents; and the fee or other estate in the realty can not be sold to provide the annuity. *Irwin, Admr. v. Wollpert et al.* 527.

21. *The annuitant incumbering part of the estate yielding the rents and profits—liability of the residue.* A testator devised lot 1 to A, his son, and lot 2 to B, C and D, his grandchildren, and gave his widow a yearly annuity of \$300, "to be issuing and payable out of" said lots; and the will provided, that if any part of such annuity should remain unpaid after the expiration of thirty days from the time the same should be due and payable, the widow might enter into the premises so charged and receive the rents and profits thereof until the annuity was thereby paid, or paid by the devisees. The widow and the son, A, gave a deed of trust, for a loan to the latter, on lot 1, under which a sale was had, in default of payment, and the title was thereby lost. Lot 1 was the most valuable of the two lots. It appeared that the widow received all the rents and profits of both lots until the sale under the trust deed, and of lot 2 to her death, through her agents, and that B, C and D were never in possession of lot 2, and never received any rents of the same: *Held*, in a suit by the administrator of the widow, to collect the annuity, that the devisees of lot 2 were not liable for any part of the annuity, and that if they were liable they could only be chargeable with a ratable part thereof. *Ibid.* 527.

22. In such case, the widow, by joining in the trust deed, whereby the title to one lot became lost, relinquished all claim to a ratable part of her annuity, which should have been paid out of lot 1; consequently, neither she nor her administrator could charge the whole of the annuity against the grandchildren's lot, even if they were liable beyond the rents and profits thereof. *Ibid.* 527.

23. *Allowing the annuity to accumulate.* If the annuity should not be paid, the will provided a remedy by taking possession of the lots; and the widow could not lie by and neglect her remedy, and permit the annuity, without the fault of the devisees, to accrue from year to year, until it was sufficient in amount to swallow up the fee of the lots, and then ask a court of equity to have them sold to satisfy her claim. *Ibid.* 527.

**CONTEST OF WILL.**

24. *Trial by jury.* See CHANCERY, 24, 25.

## WITNESSES.

## COMPETENCY.

1. *Party to suit, as against one suing as the representative of a deceased person.* Where A transferred his bond for a deed to B, without consideration, thereby making the latter his trustee, and procured B to make payment of the purchase money, and had the vendor convey the property to B, who died, having devised all his estate to C, and the executor of C filed a bill against A and his wife to foreclose the deed as a mortgage, it was held, that A was not a competent witness in his own behalf as to any transaction between himself and B, or to testify in his own interest when called by his co-defendant, his wife. *Stewart et al. v. Fellows et al.* 480.

## CREDIBILITY.

2. *Declarations and admissions of one of two parties.* A bought a lot and procured B, his trustee, to advance \$500, the purchase money, and take a deed in his own name. On a creditor's bill against A, he set up the fact that B had advanced the money at his request, and took the title as a security for its repayment. B died, having devised all his property to C, who also died. On bill by the personal representatives of B and C to foreclose A's equity of redemption, filed against A and his wife, the latter set up in defense that the money paid by B was advanced by him to A, and was the money of A's wife, and A so testified in the case: Held, that A's answer to the creditor's bill was competent evidence, as tending to affect the credit to be given to his testimony, his attention having been called to the allegations in the cross-bill. *Ibid.* 480.

## TABLE OF CASES

COMPRISING THE FORMER DECISIONS OF THIS COURT, CITED, COMMENTED  
UPON OR EXPLAINED IN THIS VOLUME.

### A

	PAGE.
Abt <i>ads.</i> Walker, 83 Ill. 226.....	156
Etna Life Ins. Co. <i>ads.</i> Town of Middleport, 82 Ill. 562.....	234
Alexander <i>v.</i> Crosthwaite, 44 Ill. 359.....	488
Alexander <i>ads.</i> Heyer, 108 Ill. 385.....	227
Allen <i>v.</i> Jackson, 122 Ill. 567.....	186
Allen <i>v.</i> LeMoyne, 102 Ill. 25.....	156
Allen <i>v.</i> Munn, 55 Ill. 486.....	392
American and Foreign Christain Union <i>ads.</i> Davis, 100 Ill. 313.....	156
Anderson <i>ads.</i> Brady, 24 Ill. 110.....	27
Anderson <i>v.</i> Fruitt, 108 Ill. 378.....	520
Anderson <i>v.</i> Henderson, 124 Ill. 164.....	277
Armstrong <i>v.</i> Cooper, 11 Ill. 540.....	584
Askew <i>v.</i> Springer, 111 Ill. 662.....	212

### B

Baber <i>ads.</i> Hanks, 53 Ill. 292.....	212
Baker <i>v.</i> Copenbarger, 15 Ill. 103.....	439
Baker <i>ads.</i> Johnson, 38 Ill. 99.....	105
Baker <i>v.</i> Palmer, 83 Ill. 568.....	168
Bank of Michigan City <i>v.</i> Haskell, 124 Ill. 587.....	479
Barber <i>v.</i> Hawley, 116 Ill. 91.....	479
Barron <i>ads.</i> Mineral Point R. R. Co. 83 Ill. 365.....	227
Barton <i>ads.</i> Huntington, 64 Ill. 504.....	27
Beach <i>v.</i> Miller, 51 Ill. 206.....	103
Beaird <i>ads.</i> Wolf, 123 Ill. 593.....	54
Belanger <i>v.</i> Hersey, 90 Ill. 70.....	27
Belleville, City of, <i>v.</i> Stookey, 23 Ill. 441.....	578
Bell <i>v.</i> Johnson, 111 Ill. 374.....	526
Beveridge <i>ads.</i> Forsythe, 52 Ill. 270.....	634
Billings <i>ads.</i> Coleman, 89 Ill. 182.....	44
Binkert <i>v.</i> Jansen, 94 Ill. 283.....	454
Binz <i>v.</i> Weber, 81 Ill. 288.....	234
Blackwell <i>ads.</i> Gibbs, 37 Ill. 191.....	544
Blanchard <i>v.</i> Lake Shore and Mich. Southern Ry. Co. 126 Ill. 416...	658
Blanchard <i>v.</i> Williamson, 70 Ill. 647.....	340

	PAGE.
<i>Blow v. Gage</i> , 44 Ill. 208.....	17
<i>Board of Education ads. The People</i> , 101 Ill. 308.....	22
<i>Bowen r. Schuler</i> , 41 Ill. 193.....	18
<i>Bowman ads. Wettig</i> , 47 Ill. 21.....	392
<i>Boyden v. Reed</i> , 55 Ill. 458.....	517
<i>Brady r. Anderson</i> , 24 Ill. 110.....	27
<i>Bragg v. Geddes</i> , 93 Ill. 39.....	488
<i>Brant ads. Ryan</i> , 42 Ill. 78.....	18
<i>Bridges ads. Haralson</i> , 14 Ill. 37.....	102
<i>Briscoe r. Power</i> , 47 Ill. 447.....	376
<i>Brownell ads. Steere</i> , 113 Ill. 415.....	211
<i>Browning ads. Humphrey</i> , 46 Ill. 476.....	637
<i>Browning ads. Sage</i> , 51 Ill. 217.....	37
<i>Brown ads. Hurd</i> , 41 Ill. 125.....	488
<i>Brown ads. Magill</i> , 98 Ill. 235.....	567
<i>Bross ads. City of Cairo</i> , 101 Ill. 475.....	476
<i>Bull ads. City of Quincy</i> , 106 Ill. 348.....	463
<i>Byers ads. Wilson</i> , 77 Ill. 76.....	545

**C**

<i>Cairo, City of, v. Bross</i> , 101 Ill. 475.....	476
<i>Cairo, City of, v. Campbell</i> , 116 Ill. 305.....	456
<i>Calumet River Ry. Co. v. Moore</i> , 124 Ill. 329.....	176
<i>Campbell ads. City of Cairo</i> , 116 Ill. 305.....	456
<i>Canisius r. Merrill</i> , 65 Ill. 67.....	27
<i>Capps ads. Enos</i> , 12 Ill. 257.....	154
<i>Carpenter ads. Mulvey</i> , 78 Ill. 580.....	105
<i>Cary ads. Walker</i> , 53 Ill. 470.....	156
<i>Cassidy v. Cook</i> , 99 Ill. 385.....	132
<i>Castner v. Walrod</i> , 83 Ill. 171.....	105
<i>Chandler ads. Sweezy</i> , 11 Ill. 445.....	108
<i>Chapman ads. Gage</i> , 56 Ill. 311.....	526
<i>Cheshire v. The People ex rel.</i> 116 Ill. 493.....	22
<i>Chicago and Alton R. R. Co. v. Flagg</i> , 43 Ill. 364.....	171
<i>Chicago and Alton R. R. Co. v. Joliet, Lock. and A. Ry. Co.</i> 105 Ill. 388.....	626
<i>Chicago and Alton R. R. Co. v. Murray</i> , 71 Ill. 601.....	659
<i>Chicago and Alton R. R. Co. v. Spring. and N. W. R. R. Co.</i> 67 Ill. 142.....	170
<i>Chicago and Eastern Illinois R. R. Co. v. Hay</i> , 119 Ill. 502.....	544
<i>Chicago and Evanston R. R. Co. v. Jacobs</i> , 110 Ill. 414.....	176
<i>Chicago and Great Western R. R. Land Co. ads. Peck</i> , 112 Ill. 414.....	635
<i>Chicago and Great Western R. R. Land Co. v. Peck</i> , 112 Ill. 432.....	204
<i>Chicago and North Wisconsin Ry. Co. ads. Dupuis</i> , 115 Ill. 97.....	176
<i>Chicago, Burlington and Quincy R. R. Co. v. Parks</i> , 18 Ill. 465.....	171
<i>Chicago, Burlington and Quincy R. R. Co. v. Warner</i> , 108 Ill. 538.....	554
<i>Chicago, Burlington and Quincy R. R. Co. v. Watson</i> , 105 Ill. 220.....	204
<i>Chicago, City of, ads. Clayburgh</i> , 25 Ill. 536.....	459

	PAGE.
Chicago, City of, <i>ads. Fuller</i> , 89 Ill. 282.....	458
Chicago, City of, <i>v. Major</i> , 18 Ill. 349.....	553
Chicago, City of, <i>v. Martin et ux.</i> 49 Ill. 246.....	554
Chicago, City of, <i>v. Scholten</i> , 75 Ill. 471.....	553
Chicago, City of, <i>ads. Village of Hyde Park</i> , 124 Ill. 156.....	232
Chicago, Mil. and St. P. Ry. Co. <i>v. Keokuk N. L. Packet Co.</i> 108 Ill. 317.....	227
Chicago, Milwaukee and St. Paul Ry. Co. <i>v. Packet Co.</i> 108 Ill. 317.....	562
Chicago, Milwaukee and St. Paul Ry. Co. <i>v. West</i> , 125 Ill. 321.....	617
Chicago, Milwaukee and St. Paul Ry. Co. <i>v. Yando</i> , 127 Ill. 214.....	385
Chicago, Rock Island and Pacific R. R. Co. <i>v. Otto</i> , 52 Ill. 416.....	554
Chicago West Division Ry. Co. <i>v. Mills</i> , 105 Ill. 63.....	658
Christy <i>v. Stafford</i> , 123 Ill. 463.....	479
Clark <i>v. Marfield</i> , 77 Ill. 262.....	154
Clayburgh <i>v. City of Chicago</i> , 25 Ill. 536.....	459
Clingman <i>v. Hopkie</i> , 78 Ill. 152.....	340
Coal and Mining Co. <i>v. Edwards</i> , 103 Ill. 472.....	22
Coari <i>v. Olsen</i> , 91 Ill. 273.....	43
Coat <i>v. Coat</i> , 63 Ill. 74.....	143
Cobb <i>ads. Ventres</i> , 105 Ill. 33.....	132
Coffeen <i>ads. Groenendyke</i> , 109 Ill. 334.....	156
Cole <i>v. Van Riper</i> , 44 Ill. 58.....	103
Coleman <i>v. Billings</i> , 89 Ill. 182.....	44
Comer <i>v. Comer</i> , 119 Ill. 180.....	368
Commercial Ins. Co. <i>v. Scammon</i> , 123 Ill. 601.....	519
Comrs. of Highways <i>ads. Wrought Iron Bridge Co.</i> 101 Ill. 518.....	479
Comstock <i>v. Henneberry</i> , 66 Ill. 212.....	300
Connelly <i>ads. Eagan</i> , 107 Ill. 458.....	526
Converse <i>ads. Harzfeld</i> , 105 Ill. 534.....	520
Cook <i>ads. Cassidy</i> , 99 Ill. 385.....	132
Cook <i>v. Heald</i> , 21 Ill. 429.....	27
Cook County <i>v. McCrea</i> , 93 Ill. 236.....	471
Cooper <i>ads. Armstrong</i> , 11 Ill. 540.....	584
Cooper <i>ads. The People ex rel.</i> 83 Ill. 585.....	236
Cope <i>ads. Lehndorf</i> , 122 Ill. 333.....	184
Copenbarger <i>ads. Baker</i> , 15 Ill. 103.....	439
Corbus <i>v. Teed</i> , 69 Ill. 205.....	156
Corlies <i>ads. Morgan</i> , 81 Ill. 72.....	156
Cornell <i>v. The People</i> , 107 Ill. 372.....	234
Cowdrey <i>v. Hitchcock</i> , 103 Ill. 262.....	342
Crane & Wesson <i>ads. Iglehart</i> , 42 Ill. 261.....	374
Crosthwaite <i>ads. Alexander</i> , 44 Ill. 359.....	488

**D**

Davis <i>v. American and Foreign Christain Union</i> , 100 Ill. 313.....	156
Davis <i>ads. Durley</i> , 69 Ill. 133.....	106
Davis <i>ads. Knox County</i> , 63 Ill. 405.....	234

	PAGE
Dazey <i>ads.</i> Freeland, 25 Ill. 294.....	342
Deenis <i>v.</i> Deenis, 79 Ill. 74.....	380
Dement <i>ads.</i> Porter, 35 Ill. 478.....	37
Ditch <i>v.</i> Edwards, 1 Scam. 127.....	65
Dolese <i>v.</i> Pierce, 124 Ill. 140.....	232
Dooley <i>ads.</i> Rucker, 49 Ill. 377.....	303
Douglas <i>ads.</i> Harris, 64 Ill. 466.....	340
Dowden <i>v.</i> Wilson, 71 Ill. 485.....	156
Dows <i>v.</i> Naper, 91 Ill. 44.....	84
Dryden <i>ads.</i> Martin, 1 Gilm. 187.....	42
Dupuis <i>v.</i> Chicago and North Wisconsin Ry. Co. 115 Ill. 97.....	176
Durley <i>v.</i> Davis, 69 Ill. 133.....	106
D'Wolf <i>v.</i> Pratt, 42 Ill. 198.....	296

**E**

Eads <i>ads.</i> Ryan, Breese, 217.....	65
Eagan <i>v.</i> Connelly, 107 Ill. 458.....	526
East St. Louis <i>v.</i> East St. Louis Gas Light and Coke Co. 98 Ill. 415.....	456
East St. Louis Gas Light and Coke Co. <i>ads.</i> East St. Louis, 98 Ill. 415.....	456
Ebelmesser <i>v.</i> Ebelmesser, 99 Ill. 548.....	143
Eckard <i>ads.</i> Thomas, 88 Ill. 596.....	63
Edwards <i>ads.</i> Coal and Mining Co. 103 Ill. 472.....	22
Edwards <i>ads.</i> Ditch, 1 Scam. 127.....	65
Edwards <i>v.</i> Pope, 3 Scam. 465.....	236
Edwards <i>ads.</i> City of Springfield, 84 Ill. 633.....	454
Elston <i>v.</i> Kennicott, 46 Ill. 190.....	392
English <i>v.</i> The People, 96 Ill. 566.....	392
Enos <i>v.</i> Capps, 12 Ill. 257.....	154
Eurigh <i>v.</i> The People, 79 Ill. 214.....	428
Eyster <i>v.</i> Hathaway, 50 Ill. 522.....	186

**F**

Fanning <i>v.</i> Russell, 94 Ill. 386.....	156
Farnsworth <i>v.</i> Strasler, 12 Ill. 482.....	338
Farwell <i>v.</i> Hanchett, 120 Ill. 573.....	18
Fassett <i>ads.</i> Life Association of North America, 102 Ill. 315.....	227
Fietsam <i>v.</i> Hay, 122 Ill. 293.....	22
First Nat. Bank of Attleboro <i>ads.</i> May, 122 Ill. 551.....	227
Flagg <i>ads.</i> Chicago and Alton R. R. Co. 43 Ill. 364.....	171
Forest <i>v.</i> Tinkham, 29 Ill. 141.....	37
Ford <i>v.</i> Marcall, 107 Ill. 136.....	44
Forsythe <i>v.</i> Beveridge, 52 Ill. 270.....	634
Foulke <i>ads.</i> Lowe, 103 Ill. 58.....	496
Foulke <i>ads.</i> Martin, 114 Ill. 206.....	567
Frank <i>v.</i> Miner, 50 Ill. 444.....	37
Franz <i>v.</i> Orton, 75 Ill. 100.....	43
Freeland <i>v.</i> Dazey, 25 Ill. 294.....	342

## PAGE.

Freeman <i>v.</i> Hartman, 45 Ill. 57.....	104
Freeman <i>v.</i> Ottawa Building, Homestead and Sav. Ass. 114 Ill. 182..	84
Fruit <i>ads.</i> Anderson, 108 Ill. 378.....	520
Fuller <i>v.</i> City of Chicago, 89 Ill. 282.....	458
Fuller <i>v.</i> Heath, 89 Ill. 296.....	458

## G

Gage <i>ads.</i> Blow, 44 Ill. 208.....	17
Gage <i>v.</i> Chapman, 56 Ill. 311.....	526
Gage <i>v.</i> Lewis, 68 Ill. 604.....	16
Gage <i>v.</i> Pirtle, 124 Ill. 502.....	527
Gage <i>v.</i> Rohrbach, 56 Ill. 262.....	526
Gale <i>ads.</i> Norton, 95 Ill. 533.....	93
Gates <i>ads.</i> Turney, 12 Ill. 141.....	340
Gay <i>v.</i> Gay, 123 Ill. 221.....	105
Gebhardt <i>v.</i> Reeves, 75 Ill. 305.....	63
Geddes <i>ads.</i> Bragg, 93 Ill. 39.....	488
Gibbs <i>v.</i> Blackwell, 37 Ill. 191.....	544
Glencoe, Village of, <i>v.</i> The People, 78 Ill. 384.....	65
Gochenour <i>v.</i> Mowry, 33 Ill. 331.....	108
Goings <i>ads.</i> Howey, 13 Ill. 95.....	103
Gould <i>v.</i> Howe, 127 Ill. 251.....	567
Greene <i>ads.</i> Richards, 78 Ill. 527.....	154
Groenendyke <i>v.</i> Coffeen, 109 Ill. 334.....	156
Groves <i>v.</i> Maghee, 72 Ill. 526.....	107

## H

Hahn <i>v.</i> Huber, 83 Ill. 244.....	155
Hailman <i>ads.</i> Paschall, 4 Gilm. 285.....	340
Hall <i>ads.</i> Mutual Aid Association, 118 Ill. 169.....	479
Hamlin <i>v.</i> United States Express Co. 107 Ill. 448.....	198
Hanchett <i>ads.</i> Farwell, 120 Ill. 573.....	18
Hanks <i>v.</i> Baber, 53 Ill. 292.....	212
Hannas <i>v.</i> Hannas, 110 Ill. 53.....	154
Haralson <i>v.</i> Bridges, 14 Ill. 37.....	102
Harding <i>v.</i> Parshall, 56 Ill. 219.....	544
Harding <i>ads.</i> Phelps, 87 Ill. 442.....	526
Hardin <i>v.</i> Jones, 86 Ill. 313.....	301
Harriman <i>ads.</i> Way, 126 Ill. 132.....	488
Harris <i>v.</i> Douglas, 64 Ill. 466.....	340
Hartman <i>ads.</i> Freeman, 45 Ill. 57.....	104
Harzfeld <i>v.</i> Converse, 105 Ill. 534.....	520
Haskell <i>ads.</i> Bank of Michigan City, 124 Ill. 587.....	479
Hatch <i>ads.</i> Weightman, 17 Ill. 281.....	338
Hathaway <i>ads.</i> Eyster, 50 Ill. 522.....	186
Havighorst <i>v.</i> Lindberg, 67 Ill. 468.....	154
Hawkins <i>v.</i> Vineyard, 14 Ill. 26.....	106

	PAGE.
Hawley <i>ads.</i> Barber, 116 Ill. 91.....	479
Hayes <i>v.</i> Ottawa, Oswego and Fox River Valley R. R. Co. 54 Ill. 373.....	626
Hay <i>ads.</i> Chicago and Eastern Illinois R. R. Co. 119 Ill. 502.....	544
Hay <i>ads.</i> Fietsam, 122 Ill. 293.....	22
Hazelwood <i>ads.</i> The People, 106 Ill. 319.....	233
Heald <i>ads.</i> Cook, 21 Ill. 429.....	27
Heath <i>ads.</i> Fuller, 89 Ill. 296.....	458
Heath <i>ads.</i> Smith, 102 Ill. 130.....	577
Heissler <i>ads.</i> Stose, 120 Ill. 436.....	93
Henderson <i>ads.</i> Anderson, 124 Ill. 164.....	277
Henneberry <i>ads.</i> Comstock, 66 Ill. 212.....	300
Hersey <i>ads.</i> Belanger, 90 Ill. 70.....	27
Heustis <i>v.</i> Johnson, 84 Ill. 61.....	342
Hewitt <i>v.</i> Long, 76 Ill. 399.....	381
Heyer <i>v.</i> Alexander, 108 Ill. 385.....	227
Hickman <i>ads.</i> Smith, 68 Ill. 314.....	154
Hicks <i>v.</i> Siliman, 93 Ill. 255.....	278
Hinckley <i>ads.</i> Shortall, 41 Ill. 219.....	105
Hinze <i>v.</i> The People, 92 Ill. 406.....	234
Hitchcock <i>ads.</i> Cowdrey, 103 Ill. 262.....	342
Hitchcock <i>ads.</i> Lang, 99 Ill. 550.....	103
Hoagland <i>ads.</i> Steere, 39 Ill. 264.....	338
Hoener <i>v.</i> Koch, 84 Ill. 408.....	170
Hogan <i>ads.</i> Sheen, 86 Ill. 16.....	156
Hollingsworth <i>v.</i> Koon, 113 Ill. 443.....	203
Holmes <i>v.</i> Smythe, 100 Ill. 413.....	84
Holmes <i>ads.</i> Stephens, 64 Ill. 336.....	27
Holtz <i>ads.</i> The People <i>ex rel.</i> 92 Ill. 426.....	22
Home Ins. Co. <i>v.</i> Swigert, 104 Ill. 666.....	245
Hopkie <i>ads.</i> Clingman, 78 Ill. 152.....	340
Horner <i>ads.</i> Keith, 32 Ill. 524.....	184
Howe <i>ads.</i> Gould, 127 Ill. 251.....	567
Howell <i>v.</i> City of Peoria, 90 Ill. 104.....	458
Howell <i>ads.</i> Riverside Co. 113 Ill. 256.....	393, 613
Howey <i>v.</i> Goings, 13 Ill. 95.....	103
Huber <i>ads.</i> Hahn, 83 Ill. 244.....	155
Hughes <i>v.</i> Washington, 72 Ill. 85.....	143
Hughes <i>ads.</i> Zeigler, 55 Ill. 288.....	143
Humphrey <i>v.</i> Browning, 46 Ill. 476.....	637
Huntington <i>v.</i> Barton, 64 Ill. 504.....	27
Hurd <i>v.</i> Brown, 41 Ill. 125.....	488
Hyde Park, Village of, <i>v.</i> City of Chicago, 124 Ill. 156.....	232
<b>I</b>	
Iglehart <i>v.</i> Crane & Wesson, 42 Ill. 261.....	374
Illinois Central R. R. Co. <i>ads.</i> Noble, 111 Ill. 437.....	581
Illinois Central R. R. Co. <i>v.</i> Read, 37 Ill. 484.....	553

**J**

	PAGE.
Jackson <i>ads.</i> Allen, 122 Ill. 567.....	186
Jackson <i>ads.</i> Lynch, 123 Ill. 360.....	203
Jacksonville and Southeastern Ry. Co. v. Walsh, 106 Ill. 253.....	176
Jacobs <i>ads.</i> Chicago and Evanston R. R. Co. 110 Ill. 414.....	176
Jacobs v. Rice, 33 Ill. 369.....	103
Jansen <i>ads.</i> Binkert, 94 Ill. 283.....	454
Johnson v. Baker, 38 Ill. 99.....	105
Johnson <i>ads.</i> Bell, 111 Ill. 374.....	526
Johnson <i>ads.</i> Heustis, 84 Ill. 61.....	342
Johnson v. People, 83 Ill. 431.....	233
Johnson <i>ads.</i> Potwin, 108 Ill. 70.....	233
Johnson <i>ads.</i> Rolling Mill Co. 114 Ill. 57.....	661
Johnston <i>ads.</i> City of Peoria, 56 Ill. 51.....	66
Joliet, Lock, and Aurora Ry. Co. <i>ads.</i> C. and A. R. R. Co. 105 Ill. 388. 626	
Jones <i>ads.</i> Hardin, 86 Ill. 313.....	301
Jones v. Jones, 124 Ill. 254.....	195
Jones v. Jones, 16 Ill. 117.....	42

**K**

Keith v. Horner, 32 Ill. 524.....	184
Kennedy v. Kennedy, 66 Ill. 196.....	154
Kennicott <i>ads.</i> Elston, 46 Ill. 190.....	392
Keokuk N. L. Packet Co. <i>ads.</i> Chic., Mil. and St. P. Ry. Co. 108 Ill. 317. 227	
Kibbie v. Williams, 58 Ill. 30.....	102
King <i>ads.</i> Morrison, 62 Ill. 30.....	357
King <i>ads.</i> Wade, 19 Ill. 301.....	303
Knox County v. Davis, 63 Ill. 405.....	234
Koch <i>ads.</i> Hoener, 84 Ill. 408.....	170
Koon <i>ads.</i> Hollingsworth, 113 Ill. 443.....	203
Krause <i>ads.</i> Leupold, 95 Ill. 440.....	186

**L**

Lake Shore and Mich. Southern Ry. Co. <i>ads.</i> Blanchard, 126 Ill. 416. 658	
Lake, Town of, v. LeBahn, 120 Ill. 98.....	578
Lamar Ins. Co. <i>ads.</i> Pennell, 73 Ill. 303.....	285
Lander v. The People, 104 Ill. 248.....	548
Lang v. Hitchcock, 99 Ill. 550.....	103
Lavasche <i>ads.</i> McCarthy, 89 Ill. 270.....	84
Law v. The People, 87 Ill. 385.....	458
Leaming <i>ads.</i> Richards, 27 Ill. 432.....	184
LeBahn <i>ads.</i> Town of Lake, 120 Ill. 98.....	578
Lehndorf v. Cope, 122 Ill. 333.....	184
Leiter v. Sheppard, 85 Ill. 243.....	195
LeMoine <i>ads.</i> Allen, 102 Ill. 25.....	156
Leupold v. Krause, 95 Ill. 440.....	186
Lewis <i>ads.</i> Gage, 68 Ill. 604.....	18

	PAGE.
<b>Life Association of North America v. Fassett</b> , 102 Ill. 315.....	227
<b>Lindberg ads. Havighorst</b> , 67 Ill. 468.....	154
<b>Litsey v. Whittemore</b> , 111 Ill. 267.....	544
<b>Lockwood ads. Mills</b> , 42 Ill. 118.....	545
<b>Long ads. Hewitt</b> , 76 Ill. 399.....	381
<b>Long v. Long</b> , 107 Ill. 211.....	155
<b>Loomis ads. Peoria Bridge Association</b> , 20 Ill. 252.....	554
<b>Lowe v. Foulke</b> , 103 Ill. 58.....	496
<b>Lucas v. Lucas</b> , 103 Ill. 121.....	105
<b>Lynch v. Jackson</b> , 123 Ill. 360.....	203
<b>M</b>	
<b>Maghee ads. Groves</b> , 72 Ill. 526.....	107
<b>Magill v. Brown</b> , 98 Ill. 235.....	567
<b>Major ads. City of Chicago</b> , 18 Ill. 349.....	553
<b>Manufacturing Co. v. Wire Fence Co.</b> 109 Ill. 71.....	544
<b>Marcall ads. Ford</b> , 107 Ill. 136.....	44
<b>Marfield ads. Clark</b> , 77 Ill. 262.....	154
<b>Martin et ux. ads. City of Chicago</b> , 49 Ill. 246.....	554
<b>Martin v. Dryden</b> , 1 Gilm. 187.....	42
<b>Martin v. Foulke</b> , 114 Ill. 206.....	567
<b>Mauck v. Mauck</b> , 54 Ill. 281.....	156
<b>May v. First Nat. Bank of Attleboro</b> , 122 Ill. 551.....	227
<b>May v. The People</b> , 92 Ill. 346.....	599
<b>McCarthy v. Lavasche</b> , 89 Ill. 270.....	84
<b>McClellan ads. Rozet</b> , 48 Ill. 345.....	539
<b>McCrea ads. Cook County</b> , 93 Ill. 236.....	471
<b>McFarland ads. Noble</b> , 51 Ill. 226.....	104
<b>McLaughlin v. Thompson</b> , 55 Ill. 249.....	613
<b>McLaurie v. Thomas</b> , 39 Ill. 291.....	184
<b>McIntosh v. Saunders</b> , 68 Ill. 128.....	156
<b>McIntyre v. Yates</b> , 100 Ill. 475.....	204
<b>Meacham v. Steele</b> , 93 Ill. 135.....	107, 132
<b>Meeker v. Meeker</b> , 75 Ill. 260.....	155
<b>Merchants' Nat. Bank ads. Planing Mill Co.</b> 97 Ill. 294.....	599
<b>Merrill ads. Canisius</b> , 65 Ill. 67.....	27
<b>Middleport, Town of, v. Etna Life Ins. Co.</b> 82 Ill. 562.....	234
<b>Milk v. Moore</b> , 39 Ill. 584.....	156
<b>Miller ads. Beach</b> , 51 Ill. 206.....	103
<b>Miller ads. Reitzell</b> , 25 Ill. 67.....	340
<b>Miller ads. Whittaker</b> , 83 Ill. 381.....	43
<b>Mills v. Lockwood</b> , 42 Ill. 118.....	545
<b>Mills ads. Chicago West Division Ry. Co.</b> 105 Ill. 63.....	658
<b>Mineral Point R. R. Co. v. Barron</b> , 83 Ill. 365.....	227
<b>Miner ads. Frank</b> , 50 Ill. 444.....	37
<b>Mitchell ads. St. Louis, Jacksonville and Chicago R. R. Co.</b> 47 Ill. 165	626

## PAGE.

Moore <i>ads.</i> Calumet River Ry. Co. 124 Ill. 329.....	176
Moore <i>ads.</i> Milk, 39 Ill. 584.....	156
Morgan <i>v.</i> Corlies, 81 Ill. 72.....	156
Morrison <i>v.</i> King, 62 Ill. 30.....	357
Mowry <i>ads.</i> Gochenour, 33 Ill. 331.....	108
Mulvey <i>v.</i> Carpenter, 78 Ill. 580.....	105
Munn <i>ads.</i> Allen, 55 Ill. 486.....	392
Murray <i>ads.</i> Chicago and Alton R. R. Co. 71 Ill. 601.....	659
Mutual Aid Association <i>v.</i> Hall, 118 Ill. 169.....	479
Myatt <i>v.</i> Walker, 44 Ill. 485.....	155
Myers <i>v.</i> The People, 67 Ill. 503.....	234

## N

Naper <i>ads.</i> Dows, 91 Ill. 44.....	84
Nashville, City of, <i>v.</i> Weiser, 54 Ill. 245.....	163
Neff <i>v.</i> Smyth, 111 Ill. 100.....	526
Newhall <i>v.</i> Turney, 14 Ill. 338.....	54
Noble <i>v.</i> Illinois Central R. R. Co. 111 Ill. 437.....	581
Noble <i>v.</i> McFarland, 51 Ill. 226.....	104
Noble <i>ads.</i> Winslow, 101 Ill. 194.....	186
Norton <i>v.</i> Gale, 95 Ill. 533.....	93

## O

Olsen <i>ads.</i> Coari, 91 Ill. 273.....	43
Orton <i>ads.</i> Franz, 75 Ill. 100.....	43
Ottawa Building, Homestead and Sav. Ass. <i>ads.</i> Freeman, 114 Ill. 182.....	84
Ottawa, Oswego and Fox River Valley R. R. Co. <i>ads.</i> Hayes, 54 Ill. 373.....	626
Otto <i>ads.</i> Chicago, Rock Island and Pacific R. R. Co. 52 Ill. 416.....	554

## P

Packet Co. <i>ads.</i> Chicago, Milwaukee and St. Paul Ry. Co. 108 Ill. 317.....	562
Palmer <i>ads.</i> Baker, 83 Ill. 568.....	168
Parks <i>ads.</i> Chicago, Burlington and Quincy R. R. Co. 18 Ill. 465.....	171
Parshall <i>ads.</i> Harding, 56 Ill. 219.....	544
Paschall <i>v.</i> Hailman, 4 Gilm. 285.....	340
Pearce <i>ads.</i> Rhawn, 110 Ill. 350.....	563, 228
Peck <i>ads.</i> Chicago and Great Western R. R. Land Co. 112 Ill. 432.....	204
Peck <i>v.</i> Chicago and Great Western R. R. Land Co. 112 Ill. 414.....	635
Pennell <i>v.</i> Lamar Ins. Co. 73 Ill. 303.....	285
People <i>v.</i> Board of Education, 101 Ill. 308.....	22
——— <i>ex rel. ads.</i> Cheshire, 116 Ill. 493.....	22
——— <i>ex rel. v.</i> Cooper, 83 Ill. 585.....	236
——— <i>ads.</i> Cornell, 107 Ill. 372.....	234
——— <i>ads.</i> English, 96 Ill. 566.....	392
——— <i>ads.</i> Eurigh, 79 Ill. 214.....	428
——— <i>v.</i> Hazelwood, 106 Ill. 319.....	233
——— <i>ads.</i> Hinze, 92 Ill. 406.....	234

	PAGE.
People <i>ex rel.</i> v. Holtz, 92 Ill. 426.....	22
——— <i>ads.</i> Johnson, 83 Ill. 431.....	233
——— <i>ads.</i> Lander, 104 Ill. 248.....	548
——— <i>ads.</i> Law, 87 Ill. 385.....	458
——— <i>ads.</i> May, 92 Ill. 346.....	599
——— <i>ads.</i> Meyers, 67 Ill. 503.....	234
——— <i>ads.</i> Phillips, 88 Ill. 161.....	599
——— <i>ads.</i> Purrington, 79 Ill. 11.....	428
——— <i>ads.</i> Richards, 81 Ill. 551.....	561
——— <i>ads.</i> Village of Glencoe, 78 Ill. 384.....	65
Peoria Bridge Association <i>v.</i> Loomis, 20 Ill. 252.....	554
Peoria, City of, <i>ads.</i> Howell, 90 Ill. 104.....	458
Peoria, City of, <i>v.</i> Johnston, 56 Ill. 51.....	66
Perry <i>ads.</i> Roach, 16 Ill. 37.....	212
Peterson <i>ads.</i> Reed, 91 Ill. 295.....	187
Phelps <i>v.</i> Harding, 87 Ill. 442.....	526
Phillips <i>v.</i> The People, 88 Ill. 161.....	599
Pierce <i>ads.</i> Dolese, 124 Ill. 140.....	232
Pirtle <i>ads.</i> Gage, 124 Ill. 502.....	527
Planing Mill Co. <i>v.</i> Merchants' Nat. Bank, 97 Ill. 294.....	599
Pope <i>ads.</i> Edwards, 3 Scam. 465.....	236
Porter <i>v.</i> Dement, 35 Ill. 478.....	37
Potwin <i>v.</i> Johnson, 108 Ill. 70.....	233
Power <i>ads.</i> Briscoe, 47 Ill. 447.....	376
Pratt <i>ads.</i> D'Wolf, 42 Ill. 198.....	296
Pratt <i>v.</i> Stone, 80 Ill. 440.....	296
Pratt <i>ads.</i> Stone, 25 Ill. 25.....	296
Prince <i>v.</i> City of Quincy, 105 Ill. 138.....	458
Princeton <i>v.</i> Templeton, 71 Ill. 68.....	577
Pritchard <i>ads.</i> Walker, 121 Ill. 221.....	195
Prouty <i>ads.</i> Village of Winnetka, 107 Ill. 218.....	66, 578
Purrington <i>v.</i> The People, 79 Ill. 11.....	428

**Q**

Quincy, City of, <i>v.</i> Bull, 106 Ill. 348.....	463
Quincy, City of, <i>ads.</i> Prince, 105 Ill. 138.....	458

**R**

Read <i>ads.</i> Illinois Central R. R. Co. 37 Ill. 484.....	553
Reavis <i>v.</i> Reavis, 1 Scam. 242.....	380
Reed <i>ads.</i> Boyden, 55 Ill. 458.....	517
Reed <i>v.</i> Peterson, 91 Ill. 295.....	187
Reeves <i>ads.</i> Gebhardt, 75 Ill. 305.....	63
Reitzell <i>v.</i> Miller, 25 Ill. 67.....	340
Rhawn <i>v.</i> Pearce, 110 Ill. 350.....	563, 228
Rhoades <i>v.</i> Rhoades, 88 Ill. 139.....	156

	PAGE.
Rice <i>ads.</i> Jacobs, 33 Ill. 369.	103
Richards <i>v.</i> Greene, 78 Ill. 527.	154
Richards <i>v.</i> Leaming, 27 Ill. 432.	184
Richards <i>v.</i> The People, 81 Ill. 551.	561
Riverside Co. <i>v.</i> Howell, 113 Ill. 256.	393, 613
Riverside Co. <i>v.</i> Townshend, 120 Ill. 9.	302
Roach <i>v.</i> Perry, 16 Ill. 37.	212
Rohrbach <i>ads.</i> Gage, 56 Ill. 262.	526
Bolling Mill Co. <i>v.</i> Johnson, 114 Ill. 57.	661
Ross <i>ads.</i> Stribling, 16 Ill. 122.	42
Rozet <i>v.</i> McClellan, 48 Ill. 345.	539
Rucker <i>v.</i> Dooley, 49 Ill. 377.	303
Rucker <i>ads.</i> Whitmer, 71 Ill. 410.	488
Russell <i>ads.</i> Fanning, 94 Ill. 386.	156
Ryan <i>v.</i> Brant, 42 Ill. 78.	18
Ryan <i>v.</i> Eads, Breese, 217.	65

**S**

Sage <i>v.</i> Browning, 51 Ill. 217.	37
Saunders <i>ads.</i> McIntosh, 68 Ill. 128.	156
Scammon <i>ads.</i> Commercial Ins. Co. 123 Ill. 601.	519
Scholten <i>ads.</i> City of Chicago, 75 Ill. 471.	553
Schumacher <i>ads.</i> Sidwell, 99 Ill. 426.	526
Schuler <i>ads.</i> Bowen, 41 Ill. 193.	18
Sheen <i>v.</i> Hogan, 86 Ill. 16.	156
Sheppard <i>ads.</i> Leiter, 85 Ill. 243.	195
Shortall <i>v.</i> Hinckley, 41 Ill. 219.	105
Sidwell <i>v.</i> Schumacher, 99 Ill. 426.	526
Sliman <i>ads.</i> Hicks, 93 Ill. 255.	278
Smith <i>v.</i> Heath, 102 Ill. 130.	577
Smith <i>v.</i> Hickman, 68 Ill. 314.	154
Smythe <i>ads.</i> Holmes, 100 Ill. 413.	84
Smyth <i>ads.</i> Neff, 111 Ill. 100.	526
Springer <i>ads.</i> Askew, 111 Ill. 662.	212
Springfield, City of, <i>v.</i> Edwards, 84 Ill. 633.	454
Springfield and N. W. R. R. Co. <i>ads.</i> Chic. and A. R. R. Co. 67 Ill. 142.	170
Stafford <i>ads.</i> Christy, 123 Ill. 463.	479
Steele <i>ads.</i> Meacham, 93 Ill. 135.	107, 132
Steere <i>v.</i> Brownell, 113 Ill. 415.	211
Steere <i>v.</i> Hoagland, 89 Ill. 264.	338
Stephens <i>v.</i> Holmes, 64 Ill. 336.	27
St. Louis, Jacksonville and Chicago R. R. Co. <i>v.</i> Mitchell, 47 Ill. 165.	626
Stone <i>v.</i> Pratt, 25 Ill. 25.	296
Stone <i>ads.</i> Pratt, 80 Ill. 440.	296
Stookey <i>ads.</i> City of Belleville, 23 Ill. 441.	578
Stose <i>v.</i> Heisaler, 120 Ill. 436.	93

	PAGE.
Stout <i>ads.</i> Titsworth, 49 Ill. 78.....	107
Straaler <i>ads.</i> Farnsworth, 12 Ill. 482.....	338
Stribling <i>v.</i> Ross, 16 Ill. 122.....	42
Sweezy <i>v.</i> Chandler, 11 Ill. 445.....	108
Swigert <i>ads.</i> Home Ins. Co. 104 Ill. 666.....	245

**T**

Teed <i>ads.</i> Corbus, 69 Ill. 205.....	156
Templeton <i>ads.</i> Princeton, 71 Ill. 68.....	577
Terre Haute, Alton and St. Louis R. R. Co. <i>v.</i> Vanatta, 21 Ill. 188.....	171
Thomas <i>v.</i> Eckard, 88 Ill. 596.....	63
Thomas <i>ads.</i> McLaurie, 39 Ill. 291.....	184
Thompson <i>ads.</i> McLaughlin, 55 Ill. 249.....	613
Tinkham <i>ads.</i> Forest, 29 Ill. 141.....	37
Titsworth <i>v.</i> Stout, 49 Ill. 78.....	107
Townshend <i>ads.</i> Riverside Co. 120 Ill. 9.....	302
Trustees of Presbyterian Church <i>ads.</i> Whitsitt, 110 Ill. 125.....	544
Trustees <i>v.</i> Walsh, 57 Ill. 365.....	63
Turney <i>v.</i> Gates, 12 Ill. 141.....	340
Turney <i>ads.</i> Newhall, 14 Ill. 338.....	54
Tyler <i>v.</i> Western Union Telegraph Co. 60 Ill. 421.....	255
Tyler <i>ads.</i> Western Union Telegraph Co. 74 Ill. 168.....	254

**U**

United States Express Co. <i>ads.</i> Hamlin, 107 Ill. 448.....	198
---	-----

**V**

Vanatta <i>ads.</i> Terre Haute, Alton and St. Louis R. R. Co. 21 Ill. 188.....	171
Van Riper <i>ads.</i> Cole, 44 Ill. 58.....	103
Ventres <i>v.</i> Cobb, 105 Ill. 33.....	132
Vineyard <i>ads.</i> Hawkins, 14 Ill. 26.....	106

**W**

Wade <i>v.</i> King, 19 Ill. 301.....	303
Walker <i>v.</i> Abt, 83 Ill. 226.....	156
Walker <i>v.</i> Cary, 53 Ill. 470.....	156
Walker <i>ads.</i> Myatt, 44 Ill. 485.....	155
Walker <i>v.</i> Pritchard, 121 Ill. 221.....	195
Walrod <i>ads.</i> Castner, 83 Ill. 171.....	105
Walsh <i>ads.</i> Jacksonville and Southeastern Ry. Co. 106 Ill. 253.....	176
Walsh <i>ads.</i> Trustees, 57 Ill. 365.....	63
Warner <i>ads.</i> Chicago, Burlington and Quincy R. R. Co. 108 Ill. 538.....	554
Washington <i>ads.</i> Hughes, 72 Ill. 85.....	143
Watson <i>ads.</i> Chicago, Burlington and Quincy R. R. Co. 105 Ill. 220.....	204
Way <i>v.</i> Harriman, 126 Ill. 132.....	488
Weber <i>ads.</i> Binz, 81 Ill. 288.....	234

	PAGE.
Weightman v. Hatch, 17 Ill. 281.....	338
Weiser <i>ads.</i> City of Nashville, 54 Ill. 245.....	163
Western Union Telegraph Co. <i>ads.</i> Tyler, 60 Ill. 421.....	255
Western Union Telegraph Co. v. Tyler, 74 Ill. 168.....	254
West <i>ads.</i> Chicago, Milwaukee and St. Paul Ry. Co. 125 Ill. 321.....	617
Wettig v. Bowman, 47 Ill. 21.....	392
Whitsitt v. Trustees of Presbyterian Church, 110 Ill. 125.....	544
Whitmer v. Rucker, 71 Ill. 410.....	488
Whittaker v. Miller, 83 Ill. 381.....	43
Whittemore <i>ads.</i> Litsey, 111 Ill. 267.....	544
Williamson <i>ads.</i> Blanchard, 70 Ill. 647.....	340
Williams <i>ads.</i> Kibbie, 58 Ill. 30.....	102
Wilson v. Byers, 77 Ill. 76.....	545
Wilson <i>ads.</i> Dowden, 71 Ill. 485.....	156
Winnetka, Village of, v. Prouty, 107 Ill. 218.....	66, 578
Winslow v. Noble, 101 Ill. 194.....	186
Wire Fence Co. <i>ads.</i> Manufacturing Co. 109 Ill. 71.....	544
Wolf v. Beaird, 123 Ill. 593.....	54
Wrought Iron Bridge Co. v. Comrs. of Highways, 101 Ill. 518.....	479
 <b>Y</b>	
Yando <i>ads.</i> Chicago, Milwaukee and St. Paul Ry. Co. 127 Ill. 214.....	385
Yates <i>ads.</i> McIntyre, 100 Ill. 475.....	204
 <b>Z</b>	
Zeigler v. Hughes, 55 Ill. 288.....	143

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*E. J. S.*

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